

COPYRIGHT ROYALTY TRIBUNAL

In the Matter of:

COMPULSORY LICENSE FOR SECONDARY

TRANSMISSIONS BY CABLE SYSTEMS;

ROYALTY ADJUSTMENT PROCEEDING

X

:

:

:

:

:

:

:

:

:

X

2100 K Street, N.W.

Room 610

Washington, D.C.

Thursday, November 13, 1980

The hearing in the above-entitled matter commenced
at 10:00 a.m., pursuant to adjournment,

BEFORE:

MARY LOU BURG, Chairman

THOMAS C. BRENNAN, Commissioner

DOUGLAS E. COULTER, Commissioner

CLARENCE L. JAMES, JR., Commissioner

FRANCES GARCIA, Commissioner

1 APPEARANCES:

2 FRITZ ATTAWAY, Attorney-at-Law
3 Counsel for Copyright Owners
4

5
6 STUART FELDSTEIN, Attorney-at-Law
7 Counsel for NCTA
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T SWITNESS:DirectCrossRedirectRecross

ALLEN R. COOPER

by Mr. Feldstein

4

by Mr. Attaway

30

CHARLOTTE BEALES

by Mr. Feldstein

67

99

by Mr. Attaway

86

KATHRYN CREECH

by Mr. Feldstein

103

by Mr. Attaway

136

EXHIBITS:IDENTIFIED RECEIVED

NCTA R-3

102

102

NCTA R-3a

102

102

NCTA R-4

102

102

NCTA R-7

118

118

NCTA R-8

118

118

P R O C E E D I N G S

CHAIRMAN BURG: We will proceed, if Mr. Feldstein is prepared to.

Whereupon,

ALLEN COOPER

resumed as the witness, and having previously been duly sworn, was examined and testified further as follows:

CROSS EXAMINATION

BY MR. FELDSTEIN:

Q Mr. Cooper, when we left off yesterday, I believe I had concluded my questioning of you with regard to the scheme and form, to imply the scheme.

I was ready to move to questioning in some other areas. In your testimony, Mr. Cooper, you made a point of stating that there were ways in which cable systems could add DSs. You really didn't seem to be so concerned about DSs per se. They were adding programming without payment of additional copyright. Is that the thrust?

A Yes.

As far as cable households is concerned, they are subscribing for programs but not signals.

Q The addition of the DS, if the royalty fee per subscriber kept up with inflation under your hypotheticals, would not cause additional copyright payment for that additional signal per se?

1 A Would you try that again, please, Mr. Feldstein?

2 Q Yes. You had a hypothetical where you showed
3 that a cable system adding two DSs had a royalty fee per
4 subscriber increase which exceeded inflation. Therefore,
5 you stated that there would be no surcharge and the copyright
6 holder would lose out.

7 A That is true. The extent to which it exceeded
8 inflation is the only part that bothered me. As I recall,
9 the figures were almost identical. The inflation rate in
10 the percentage increase and the percentage increase in the
11 royalty fee were almost identical. I think it was 40-45 per
12 cent percentage of inflation.

13 Q Mr. Cooper, if a cable system carried an end
14 signal from a distant location, how many DSE would that be?

15 A 1.0.

16 Q If that DS was on the air for 5 hours a day,
17 how many DSs would that be?

18 A It would be one full DSE.

19 Q What if that station increased its hours to
20 become a 24-hour a day station?

21 A It would be on full DSE.

22 Q Isn't there more programming ~~time~~ coming to
23 subscribers' homes?

24 A That's true.

25 Q Isn't there less copyright being paid per program

1 by the cable system?

2 A It would be more copyright per hour of
3 programming if the show were on 15 hours a day.

4 Q If there was an increase of programming there
5 would be a decrease in the amount of copyright per program?

6 A In the payment per hour per program.

7 Q Thus the payment is geared to signals, not
8 programs, is that correct?

9 A The statute refers to signals. I refer to
10 programs because that is essentially distributed by the
11 signals and what the subscribers are paying for.

12 Q But you have just stated that the statute speaks in
13 terms of a copyright payment per signal?

14 A That is correct.

15 Q Thank you.

16 Now, when you read various portions of the
17 statute to us, there was one portion of the adjustment,
18 subsection 804. Excuse me, Section 801.

19 You read it. You stated that, or if you did not
20 read it, I will read it. "No increase in the royalty fee
21 will be permitted based on fee reductions in the average
22 number of DSE equivalents per subscriber."

23 You strongly urged upon the Tribunal yesterday
24 Mr. Cooper, as I recollect, that if there were an increase
25 in DSEs that likewise should be discounted, is that correct?

1 Is that a correct characterization of your
2 testimony?

3 A No, it is not correct. I stated an increase
4 in the DSE and the royalty payments therefore should be
5 considered an offset against a reduction in the value of the
6 dollar.

7 Q Well, I think you have stated what I said in
8 different words. The statute says that an increase in the
9 royalty fee, a factor in the increase in the royalty fee can
10 not be based on the reduction in DSEs.

11 A Mr. Feldstein, I reviewed it, and again you
12 were right yesterday in challenging my legal status. I look
13 at that section you just quoted, and consider the converse
14 to be equally significant.

15 Q Is the converse point the one that you were
16 making yesterday?

17 A Yes. No decrease in the royalty fee will be
18 permitted based on the increase in the number of DSEs per
19 subscriber.

20 Q Since Congress said no increase could be based
21 on a reduction, could they not also have said that no
22 decrease could be based on an increase in DSEs?

23 A I think having said one, nevertheless also
24 said the other. By having said one, they have also said the
25 other.

1 Q That is interesting, another one of the --

2 Another one that you challenge was the shift
3 through interim growth of a system from one of the two who
4 paid Form 1 or Form 2 categories to own a DSE, or Form 3
5 category, is that correct?

6 A That is correct.

7 Q If the copyright --

8 A If I may expand one sentence on that. It is
9 my conclusion as a system increases, in its gross receipts,
10 that it is not perpetually entitled to the small system
11 exemption shown.

12 Q That is obvious from the construction of the
13 statute. The fact is the system allows for small system exemp-
14 tions. It has a structure with small and large systems.

15 If a system, Mr. Cooper, was paying a nickle
16 or a dime per subscriber as a royalty fee under small
17 system exemption and it grew to the point where it was now a
18 Form 3 system and suddenly leaped, as the data has shown
19 they do, to a payment somewhere in the nature of close to
20 \$50 per semi-annual period, they have leaped a significant
21 quantum of the payment per subscriber, is that correct?

22 A That is certainly correct.

23 Q Isn't the copyright holder getting more money
24 assuming the same number of DSEs equivalents? Hasn't his
25 royalty fee per subscriber for that system increased marginally?

1 A Yes, it would have.

2 Q Mr. Cooper, you have challenged yet another
3 fact or we might exhibit to an increase in the royalty fee
4 per subscriber, namely the revenue from additional television
5 sets in a subscriber's home. You have stated that only first
6 set revenues should be included. Is that correct?

7 A In what?

8 Q The calculations of the increase in revenues as
9 an offset against inflation.

10 A Yes. On the first set subscriber revenues to
11 determine whether or not the copyright owners' payments
12 have been eroded by inflation. Subscriptions. This is consistent
13 with the interpretation of the Copyright Royalty Tribunal.

14 Q Of the Copyright Royalty Tribunal?

15 A Yes.

16 COMMISSIONER BRENNAN: How do you make that
17 interpretation?

18 THE WITNESS: From the questions in your CRT
19 survey.

20 COMMISSIONER BRENNAN: I am aware of the
21 questionnaire, but I am not aware that we made an interpreta-
22 tion as to what is relevant.

23 THE WITNESS: Mr. Brennan, I certainly would not
24 argue on that. It would seem to me that you prepared the
25 questionnaire to obtain information relevant to this
proceeding.

1 The question you asked of the cable systems
2 related to the change in the first set rates.

3 COMMISSIONER BRENNAN: Are you not suggesting that
4 anything omitted clearly is not relevant to the proceeding?

5 THE WITNESS: I couldn't tell what was omitted,
6 sir.

7 BY MR. FELDSTEIN:

8 Q The Act, Mr. Cooper, refers to rates charged cable
9 subscribers for basic services. Are you reading second set,
10 additional set revenues out of the revenues from the basic
11 services?

12 A I am including them in the gross receipts calcu-
13 lations. I would exclude them from the determination as to
14 whether or not cable system rates have kept up with the
15 changes in the value of the dollar.

16 Q Doesn't Congress pay Copyright Office revenues?

17 A Yes.

18 Q You would exclude them from their calculations
19 although they pay?

20 A Yes. I would.

21 Q Mr. Cooper, didn't you include them on
22 Copyright Exhibit rebuttal 4 when you were attempting to
23 change around the NCTA 1976 figures?

24 A Let me look.

25 Q That is R-4, page 3. You added 40-1/2 cents to

1 the first cent rate.

2 A The reason for that, Mr. Feldstein, is that
3 the reference there are total copyright payments that would
4 have been made by cable systems in 1976 if the Act would
5 have been in effect then. Those total copyright payments
6 that would have been made by cable systems would have included
7 gross receipts from second sets and other sources that are
8 included in the basic services.

9 Q Thus would you include them there? You would
10 make cable operators still pay copyright on them. You would
11 exclude them as a factor in comparing '76 with '80?

12 A I believe that interpretation would be totally
13 consistent and proper to the statute.

14 Q Does the statute talk about first or second
15 set revenues?

16 A The statute refers to the basic services of
17 providing secondary transmissions to subscribers. To me,
18 the basic service as I have interpreted it, is wiring a home
19 so that it can receive cable transmissions. That is
20 therefore the first set rate.

21 Q Payment under Section 111, Mr. Cooper, is based
22 on percentage of the gross receipts from subscribers to the
23 cable services, to the basic services. Is that correct?

24 A Yes. It is correct.

25 Q So, it is included in the basic service in the
statute for payment, but you would exclude it from the

1 adjustment?

2 A I am referring to the statute or language that
3 says, as I recall, that the basic services of providing
4 secondary transmissions to households --

5 Q I would interpret to you, Mr. Cooper, that the
6 language in both areas is a similarity which can not be
7 evaded.

8 A I was referring specifically to the language that
9 deals with this proceeding. It says if a rate charged cable
10 system subscribers for basic services, if providing
11 secondary transmissions are changed, et cetera, this is on
12 page 127 of the Commerce Clearing House. Section 801.

13 Q Mr. Cooper, in your rebuttal exhibit number 2,
14 which is entitled "How to Add DSEs," would the royalty
15 payment --

16 A I have it now.

17 Q Mr. Cooper, do you have, and I realize there is
18 a hypothetical in any data on the increase in DSEs from
19 1976 through 1979?

20 A Mr. Feldstein, I don't know how many DSEs, cablesystem
21 carried in 1976. So, I couldn't respond to that.

22 Q How about in 1979?

23 A There were 1978, the figure was about 2.6. We have
24 not even started really our analysis of the 1979 statements
25 of account. But my impression is that the number has in-
creased.

1 Q Mr. Cooper, are you aware that in the period
2 1976-1979 there were in place some rather stringent
3 limitations on the number of DSs which a cable system
4 could carry?

5 A Only with relationship to some cable systems,
6 not to the total industry. Most cable systems were not
7 restricted with respect to the number of DSs. they could
8 carry.

9 Q Mr. Cooper, do you know which cable systems
10 were not restricted?

11 A Which ones were not restricted?

12 Q Yes.

13 A Primarily systems serving smaller markets
14 or outside all TV markets. If you are to insert grandfather
15 systems in larger markets.

16 Q Mr. Cooper, could a grandfather system have
17 the DSs if it was in a television market?

18 A Not if it exceeded FCC regulations.

19 Q Does "grandfather" mean they could only carry those
20 they carried prior to the rules?

21 A In those markets where DS restrictions --

22 Q Mr. Cooper, were there DS restrictions
23 in every television market?

24 A No, sir.

25 Q What television markets were there not
television restrictions, Mr. Cooper?

1 A It is my impression that any cable system
2 with fewer than 1,000 subscribers, no restrictions applied.

3 Q But for cable systems with more than 1,000
4 subscribers, which were located in any television market,
5 were there restrictions?

6 A Yes, there were. I think that the 1,000
7 subscribers limit effectively removed, if I recall, 40-50
8 per cent of the cable systems in the country from any
9 restrictions regardless of which market.

10 Q Are we talking about DSE systems here?

11 A They are not.

12 Q Are we talking about DSE systems here?

13 A In R-2 we are.

14 Q Would any cable system with 1,000 subscribers
15 be one of those?

16 A I have said they would not.

17 Q They are not relevant.

18 A They could be in Alaska.

19 Q I am asking about DSE systems.

20 A Yes. I am saying cable systems in Alaska
21 could be a DSE system with 1,000 subscribers. You asked me
22 if any -- I answered.

23 Q Are you therefore stating that the vast bulk
24 not all of cable systems which pay in a DSE basis, and were
25 located in television markets had DS restrictions from
1976-1979.

1 A I would.

2 Q If they had restrictions from '76 to '79,
3 could they have added these 2 DSs that you have postulated?

4 A Between '76 and '79 they could not have.

5 Q Thus your hypothetical is an extreme and unlikely
6 case.

7 A Not at all. My hypothetical is a hypothetical
8 case. It reflects the fact that the FCC has acted to
9 eliminate totally from all systems the restrictions on DS
10 carriage.

11 Q Does it reflect the fact that existed between
12 1976 and January 1, 1979?

13 A It does not.

14 Q Is this one of your analyses that flits on
15 the margin?

16 A It is not.

17 Q You are trying to move a hypothetical into an or
18 as if it was a real life illustration.

19 A It is not a real life one.

20 Q Not as of January 1, 1980.

21 A Thank you

22 Q Mr. Cooper, I would like to refer to now an
23 exhibit entitled Copyright Owners' ~~Exhibit 2~~. It is not
24 Exhibit 2. It is in Exhibit 2, introduced on page 88 of the
25 October 2 transcript. I'm sorry. Page 86 of the October 2
transcript.

1 A That is Dublin subscriber system?

2 Q No, Exhibit 2 is entitled "Long Form Systems."
3 It was introduced by counsel, Mr. Attaway, during his cross
4 examination of Ms. Beales in that day.

5 A May I see the exhibit, Mr. Feldstein?

6 MR. FELDSTEIN: I have instructed the counsel
7 to tell the witness to ignore the scarrulous marks on the
8 exhibit.

9 THE WITNESS: There is Copyright Owners' Exhibit 2.

10 MR. FELDSTEIN: Yes.

11 BY MR. FELDSTEIN:

12 Q Would you turn to the, on both first pages and the
13 second page, there are references to the numbers.

14 A Are you speaking about the second page beginning
15 Copyright Owners' Exhibit 3?

16 Q Yes. They were numbered separately. That
17 is correct. There are references to the number of DSE equiva-
18 lents in '76 and '79.

19 A Those were the figures from the NCTA provisions.

20 Q Mr. Cooper, you admitted a moment ago to me
21 that you had no reliable data of your own in 1976 and 1979
22 DSEs. Is that correct?

23 A That is correct. We relied upon NCTA material.

24 Q Mr. Cooper, did you recollect that NCTA
25 evidence that the number of DSEs in '79 was 2.9?

1 A We took that figure and used it in this Exhibit.

2 Q Do you remember how NCTA introduced it and
3 what it said?

4 A It referred to an increase in DSEs. One of your
5 exhibits that dealt with an increase in DSEs from 1978 -- one
6 to 1979 or two.

7 Q Do you remember how many systems were used to
8 total all that? To come up with that figure?

9 A For the 1979, two tabulations, I believe you
10 referenced the use of all statements of account in the
11 public files at the Copyright Office, and presumably
12 for Form 3 systems that number should have been about a
13 thousand.

14 Q I could supply the page number for the record.
15 However, the Exhibit stated that this was done on a sample,
16 and only 19 DES systems were used.

17 A 1979, two.

18 Q Correct.

19 A One moment please, Mr. Feldstein. I am trying
20 to recall. I believe that your witnesses have testified
21 to a complete tabulation of the 1979-2 statements of account.
22 This is the reason I responded that way. I would be
23 surprised if you did a complete tabulation of 1979-2 as
24 testified that you would have based this figure on the 19 or
25 fewer systems that were in the hundred-station sample.

1 Let me verify that. I don't want to ask you questions. I
2 will check.

3 Q We will go on from that point. It was a
4 hundred system sample. On some of which were DSE systems.
5 In any event, Mr. Cooper, thus you took the two-point
6 nine from the NCTA Exhibit, correct?

7 A Yes. And the 2.5.

8 Q You took the 2.5 from where?

9 A The NCTA Exhibit.

10 Q The exhibit or was it back in the May file, Mr.
11 Cooper?

12 A It was in the May file. It was also implied
13 in the calculations of the copyright fees paid by the Form 3
14 systems in your current filing in this proceeding.

15 Q Mr. Cooper, I would refer you to the portion
16 of the item and exhibits where Ms. Beales did calculate
17 the 1976 copyright payments. You recollect that she did
18 it the reverse. You recollect that she calculated what the
19 small systems would pay and then subtracted?

20 Is that not what she did?

21 A I think that is what she testified to. Yes.

22 Q Thus, she never testified to or did she have to
23 testify to the number of DSEs in 1976, is that correct?

24 A Presumably, in developing the data by the
25 subtractive process, she would not have had to rely upon the
2.5 DSEs estimate.

1 Q Mr. Cooper, in making your calculations
2 here, you appear to have used 2 factors as factors for
3 the increase in the royalty payment per subscriber. Higher
4 basic revenues and increase in DSEs. Is that correct?

5 A Yes.

6 Q Did not NCTA state that it believed that there
7 were at least two other factors which might have exhibited
8 total increase in the royalty fee per subscriber?

9 Namely, additional set revenues and a shift
10 from category to category?

11 A I am trying to stay with this example, which
12 deals with long form cable systems. I am assuming there
13 was no shift between 1976 and 1979 for that system.

14 Q Assuming that to be the case, what percentage of
15 the increase might have been due to increase in additional set
16 revenues?

17 A My calculations and examinations of statements
18 of account suggest that additional set revenues for the
19 average large system represent perhaps less than five per
20 cent of the total gross receipts. So since there were addition-
21 al sets in 1976 and if the gross receipts in 1979 is still
22 under five percent, it is a very small factor.

23 Q In Copyright Owners' R-4, you did show an
24 increase. You showed additional set renewals in the
25 neighborhood of approximately 7 per cent or slightly over,
is that correct?

1 A Well --

2 Q Your 40 and a half cents on top of \$6.69?

3 A That is correct.

4 Q Back to your Copyright Owners' Exhibit 3. You
5 have assumed the increase period, thus in your Copyright Owners'
6 Exhibit 3, you have simply assumed the increase in royalty
7 fee per subscriber was due to simply two factors, higher basic
8 revenues as you defined it, and additional DSEs.

9 A That is correct.

10 Q The bottom line, in that Exhibit, postulates
11 the percentage and increase due to higher basic revenues is
12 17.3 per cent; is that correct?

13 A That is correct.

14 Q Does not your own exhibit taken from the Copyright
15 Royalty Tribunal questionnaire show that the increase in basic
16 revenues through the charges that cable systems make for
17 the basic services was in the neighborhood of 15 per cent?

18 A No.

19 That was just the increase in the first set rate.
20 I don't know anything about the total gross receipts for CRT
21 survey.

22 Q We are talking about, not about total gross receipts
23 but royalty payment per subscriber. What you could attribute
24 the increase in royalty payment per subscriber to.

25 A What factors went into that increase?

Q Right.

1 A Included in that would be an increase in the
2 first set subscriber rate plus these other factors which you
3 imputed plus a change in DSEs.

4 Q But in attempting to divide them out, you have
5 divided that entire increase simply into two parts? Is that
6 correct?

7 A I don't believe it is correct, Mr. Feldstein. We
8 have used, to the best extent of my knowledge, for the gross
9 revenues for basic service receipts, from all sources, not only
10 from the first set.

11 Q We were dealing with Copyright Owners' Exhibit
12 2 of gross revenues from all sources.

13 A That is certainly the case in terms of or as
14 indicated in our footnotes on Copyright Owners' Exhibit 2.

15 Q Mr. Cooper, let me return now to the copyright
16 owners' exhibit R-7. It is your attempted reworking of the
17 rebuttal, one of the NCTA, the Times-Mirror information
18 you have shown, and no one has denied that the fact book
19 data for 1980 and for 1976 lags behind up-to-date data. Is
20 that correct?

21 A That is certainly correct.

22 Q You stated yesterday that that was your, I believe,
23 present point, in doing this. Was that not one of your present
24 points?

25 A It is one of three^e reasons we had.

1 Q You pointed out yesterday on both exhibits
2 to explain that you felt that there some unexplained
3 anomalies in data provided by Times Mirror and by the fact
4 book with regard to the number of subscribers in 1980.
5 Is that correct?

6 A I would just like to reserve the word anomalies
7 to deal with the interpretation of the Act rather than these
8 variations.

9 Q I am interpreting the exhibit, not the Act.

10 A I understand that.

11 Q Mr. Cooper, would you read at the top what it
12 says in terms of what Times-Mirror has given you?

13 A Times-Mirror cable television franchises.

14 Q Please stop right there. It said franchises?

15 A This is franchises.

16 Q Does it say cable systems?

17 A Is there a difference?

18 Q These 12 franchises, Mr. Feldstein, were
19 referenced by Mr. Collins.

20 Q Mr. Young.

21 A Excuse me. To the extent that there were cable
22 systems where there was not, were in addition to their
23 beginning rate regulation. There was no problem in terms of
24 the units that comprised the franchise. He differentiated
25 these cable systems from all others because there were not
community problems wherever some communities were regulated and

1 some were unregulated.

2 Q My question was, Mr. Cooper, and I ask it again,
3 is there a difference between a franchise and a cable system?

4 A There certainly could be.

5 Q What would that difference be?

6 A If you were dealing with an individual franchised
7 area, a cable system could be composed of, or could serve
8 a number of communities through a common head end. Each of
9 those communities could require a separate franchise.

10 Q Thus one cable system could be composed of several
11 franchised areas?

12 A That is certainly true.

13 Q In reporting the number of subscribers, does the
14 fact book give the numbers by systems or by franchise?

15 A By cable systems.

16 Q By system?

17 A Yes.

18 Q On your exhibit, Mr. Cooper, you show four
19 situations. Ironton, Ohio. Sorry, three. Ironton, Ohio, Wil-
20 liamsport, Pennsylvania, Los Verdes, California. This is where
21 the fact book with presumably earlier data shows more subscribers
22 than Mr. Young claims Times-Mirror had on September 1, 1980.
23 Is that correct?

24 A For those three listings, yes.

25 Q Did you check the fact book to see whether this

1 was a single franchise system or a multiple franchise system?

2 A I couldn't tell that from the fact book. What
3 the fact book lists, Mr. Feldstein, are the communities
4 served by the cable systems. There is nothing that I could
5 say in terms of fact book listings or in the statements of
6 account for those three systems that differentiated them from the
7 other nine. In every instance, the statement of account for
8 these cable systems for these listings, showed multiple listings
9 served. I would assume each community is separately
10 franchised.

11 Q If you look at the title again, Mr. Young's
12 exhibit, where it says, "Franchise," you did explain yesterday,
13 he put down the number of subscribers for Williamsport Community
14 only.

15 A You reported to us that is what he had done.

16 Q Is it not possible he did the same thing for Rancho
17 Palo Verdes and Ironton, Ohio?

18 A I could have.

19 Q Thus explain the difference?

20 A It does not. In that case it is difficult for
21 us to understand, why he presented us with that figure when he
22 was discussing in his time here that these were 12 cable systems
23 that were unregulated. We had questioned him about producing
24 a list for us, the data for those 12 cable systems.

25 Q Turning to page 3 of this sample exhibit, are you
saying that all 1976 Form 3 systems are understated by 12-1/2%?

1 A No. I am saying to the best of my ability, I
2 was able to identify six of the 12 cable systems, six of the
3 12 franchises, do you prefer, Mr. Feldstein?

4 Q Yes.

5 A Six of the 12 items listed with the rates shown
6 and the subscribers listed as falling into a Form 3 category
7 in 1976. That is if cable systems had paid royalties in 1976.

8 Q Do you think that these six Times-Mirror
9 unregulated franchised communities are any way representative
10 of all of the listings in the fact book?

11 A Well, I do not think so.

12 Q Thus are you not trying to project these systems
13 to represent all of the Form 3 systems?

14 A No.

15 The data that we have in terms of using the
16 fact book when we have discussed this before, relates to two
17 problems with the fact book. Two of many. One of them is that
18 the fact that the number of subscribers is not current.

19 Secondly, the rates shown are not current. The
20 term issued by Mr. Young at least gives us presumably a firm
21 look on one of those two factors. That is the rate charged
22 by the cable systems in 1976. All that we have here is to
23 indicate that assuming the subscribers data were right, the
24 mere fact that the number of subscribers was correct in the
25 fact book, the fact that rates were out of date, it still
would result in an understatement in the area of 12 per cent.

1 Q Again, Mr. Cooper, you are not referring to
2 systems here. You are referring to franchises; is that correct?

3 A Oh, dear. We are dealing, Mr. Feldstein--
4 my expectations when Mr. Young was testifying about cable systems
5 and we asked him to turn in cable systems data, that is what
6 he turned in. The extent to which we are now using the word
7 franchise is various cable systems to explain the difference
8 to us of erroneous data or errors made in the delivery of the
9 terms not completely comprehensible to me. I think that Mr.
10 Young may be using franchises and cable systems interchangeably
11 or he may not. We asked for cable system. He testified about
12 cable systems. And we assume that they are cable systems. In
13 any event, I don't think this significantly effects CRO 3
14 cable exhibits.

15 The fact we are holding constant the rate change on
16 October '76 as reported by Mr. Young.

17 Q Mr. Cooper, you testified yesterday that the addi-
18 tional subscriber was what made cable profitable. The
19 increase in subscribers.

20 MR. ATTAWAY: Excuse me. I object to that. I
21 don't believe Mr. Cooper did testify to that. I read in the
22 testimony of Mr. Addiss.

23 MR. FELDSTEIN: And then asked many a question.
24 He stated he thought profits went up by two factors; one when
25 you added subscribers to existing systems and two the addition
of new services like pay TV.

lw-1

1 MR. ATTAWAY: With that clarification, I will
2 withdraw the objection.

3 MR. FELDSTEIN: Thank you.

4 BY MR. FELDSTEIN:

5 Q If a cable system were not yet profitable, would
6 the addition of new subscribers add profit to that system?

7 A It would certainly, it were not profitable after
8 the addition of services, it should significantly reduce their
9 loss.

10 Q Reduction of loss or contribution to expense?

11 A A contribution to the operating margins of the
12 system.

13 Q I believe that the testimony of Mr. Collins,
14 which Mr. Attaway yesterday talked about that revenue being
15 largely a contribution to the system expense.

16 A Towards offsetting the system's expense. I can't
17 visualize how revenue contributes to that.

18 MR. FELDSTEIN: They are accountant terms. What
19 we call an offset, those expenses are a contribution to
20 meeting those extensions. What Mr. Cooper adds subscribers?

21 THE WITNESS: The addition of services, marketing
22 door to door campaigns, probably expansion of the cable system
23 to areas that were not previously wired, any large number of
24 factors.

25 BY MR. FELDSTEIN:

Q I did not express myself clearly. What would add

1 subscribers to a fully built, existing system?

2 A Assuming no expansion in the area served, it
3 would probably be primarily a change in programming. It could
4 also be improved marketing of the systems. But, I would say
5 primarily it would be a change in the services being offered
6 to subscribers.

7 MR. FELDSTEIN: For the record, on page 8 and other
8 places in the transcript of Monday, October 6th, Mr. Young, in
9 talking about regulated and deregulated continually referred
10 to franchises, not systems.

11 I have no more questions of Mr. Cooper.

12 COMMISSIONER BRENNAN: Madam Chairman, my
13 intervention now, I suppose, could be characterized more
14 properly as an observation rather than questions for the witness.

15 As I anticipated Mr. Feldstein in asking
16 questions of the witness late yesterday, it produced some
17 extremely interesting, possibly surprising answers as to the
18 understanding of the joint copyright owners concerning the role
19 of the CRT if your plan is adopted as submitted by this body.
20 I am referring to the testimony that the intent of the plan
21 involves allowing individual cable operators to, in the next
22 several years, submit petitions to this body relief on
23 practically any basis not limited to regulatory restraint.

24 I trust that when the joint copyright owners
25 submit their proposed findings and conclusions, that as part

1 of that package, there will be included proposed regulations²⁹
2 in this area, together with appropriate legal supporting
3 authority.

4 Another question which readily comes to mind is who
5 will pay the additional costs of such proceedings. I think
6 that also should be addressed at that time.

7 Thank you, Madam Chairman.

8 CHAIRMAN BURG: This is a good place to break
9 for a few moments.

10 (A brief recess was taken.)
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CHAIRMAN BURG: Back on the record. You may
2 continue, Mr. Attaway.

3 REDIRECT EXAMINATION

4 BY MR. ATTAWAY:

5 Q Mr. Cooper, I would like to approach redirect in
6 reversed order of the cross-examination. I will hit first
7 that which is most fresh in our minds. I would like to
8 start with the comments of Commissioner Brennan and also
9 the cross-examination, some of the cross-examination of
10 Mr. Feldstein yesterday.

11 It relates to the treatment of rate regulation
12 as an extenuating factor in the decision of this Tribunal
13 and how this issue relates to our proposal. Would you refer
14 please, to Copyright Owner Exhibit R7, specifically page 2?

15 Is it true that so far in this proceeding, these
16 are the only concrete examples of cable systems or cable
17 franchises as we now understand them to be that are totally
18 deregulated?

19 A Yes. This is what Mr. Young made a very big
20 point of.

21 Q I don't recall any other specific examples of
22 unregulated systems with which we can compare with regulated
23 systems to see the difference. What was the result of your
24 comparison with these unregulated systems to the regulated
25 systems of Times-Mirror?

etp2 1 A It indicated a difference of three percent in their
2 average rate for the first set.

3 Q In other words, the regulated systems were three
4 percent higher? The average rates.

5 A No. The average rates for the nonregulated systems
6 were three percent higher than for all Times-Mirror systems.

7 Q How does this relate to your analysis of the CRT
8 survey and the differences in the average rate of regulated
9 and nonregulated systems?

10 A I believe they coincide almost exactly.

11 Q Is it your conclusion then that the significance
12 of this factor, rate regulation, based on the evidence we
13 now have in the record, is very, very small?

14 A Yes, sir.

15 Q Would you suggest to the Tribunal that rate regula-
16 tion be considered in any way as extenuating factor?

17 A I think the Tribunal is still required to consider
18 it, but I think the Tribunal should review it with very minor
19 significance.

20 Q Based on the evidence in the record, the difference
21 between regulated and unregulated systems is very slight. You
22 have just said. Could you not or would you not recommend
23 to the Tribunal that it dismiss regulation as an extenuating
24 factor and not entertain individual requests or industry
25 requests that this factor be considered to decrease the amount

1 of increase?

2 A I have testified to that affect, Mr. Attaway.

3 Q Thank you.

4 COMMISSIONER BRENNAN: To borrow one of Commissioner
5 James' expressions, I am getting a little confused, Mr.
6 Cooper, as to whether you are testifying to explain to us
7 your understanding of the operation of the proposal of the
8 joint copyright owners or whether you are testifying as
9 to your personal views. Could you clarify that?

10 THE WITNESS: The statute, as I read it, says the
11 CRT may consider the restraints due to rate regulations as an
12 extenuating factor. I think that this is a charge to you.
13 That is why we have presented evidence. That is why in my
14 opinion, Commissioner Brennan, the CRT was wise to include
15 these questions in this questionnaire that went out to the
16 cable systems.

17 I think that you need to get a bearing on whether
18 rate regulation is a restraint factor on the ability of
19 cable systems to have raised their rates to keep up with
20 inflation.

21 That is not an opinion except it is my reading of
22 the Act. It is in direct correlation with your reading of the
23 Act. What I was trying to say and what we have demonstrated
24 in this exhibit that we are currently talking about and in our
25 analysis of the CRT survey situation is that the rate

etp4

1 regulation has amenable deterrent effect upon the ability
2 of cable systems to raise their rates. This is versus the
3 action taken by cable systems that are totally unregulated
4 with respect to rates.

5 COMMISSIONER BRENNAN: As I understand your testimony
6 from late yesterday it is your understanding of the statute
7 that we might have jurisdiction in the next several years to
8 entertain individual relief petitions from cable operators?

9 THE WITNESS: It is a possibility to the extent
10 that the mandate from Congress in the Act says that you may
11 consider deterrent of rate increases as an extenuating
12 factor seems to open this possibility up.

13 COMMISSIONER BRENNAN: We may do this beyond
14 December 31, in the context of individual relief petitions?

15 THE WITNESS: I don't know whether I am qualified
16 to answer that beyond the fact that the Copyright Tribunal
17 apparently has at its discretion whether to consider the
18 impact of rate regulation as an extenuating factor. To
19 the extent that a cable system operator may feel that any
20 proposal that you make does not take this extenuating factor
21 to full account, he may presumably petition you for relief.

22 COMMISSIONER BRENNAN: Thank you sir.

23 BY MR. ATTAWAY:

24 Q Mr. Cooper, I believe your last statement was
25 addressed to what jurisdiction this Tribunal might have. I

1 think we need to make clear what the proposal of Copyright
2 owners is with respect to this issue. I think there is some
3 considerable confusion based on some of the testimony that
4 Mr. Korn gave several weeks ago and also some of your
5 comments yesterday and today.

6 Is it not true that copyright owners are proposing
7 that this Tribunal not include the issue of rate regulation
8 as an extenuating factor in its decision in this proceeding?

9 A It is so true.

10 Q We are not recommending that the Tribunal entertain
11 petitions for special relief or anything else on this issue
12 now or next year or any other time; is that true?

13 A That is true.

14 Q We are recommending that the Tribunal in 1985 when
15 the next rate review proceeding comes up address this issue
16 once again and make a decision based on the evidence available
17 in 1985. Is that correct?

18 A That is true.

19 MR. ATTAWAY: I hope that clears up our position.

20 BY MR. ATTAWAY:

21 Q Back to Copyright Owners Exhibit R7. In answer
22 to Mr. Feldstein's questions, I believe you stated that it
23 was your understanding that we had requested for, of Mr.
24 Young, the list of 12 systems that were unregulated. Is
25 that correct?

1 A That was my recollection.

2 Q May I quote from the transcript of October 6, at
3 page 48? I made the request of the Chairman. "Madam
4 Chairman, the witness speaks about the 12 systems that were
5 unregulated. He was unable to quickly give us a list of
6 those systems. Could I ask that the witness at some subsequent
7 time to provide that list of 12 systems for the record."

8 Was it your understanding that this exhibit was in
9 compliance with that request?

10 A Absolutely, sir.

11 Q But you have found out this morning that in
12 fact this exhibit does not reflect the request; is that correct?

13 A My attention was directed to the fact that the
14 exhibit was headed franchises rather than systems. Some
15 distinction was being made therefore.

16 Q Again, referring to the transcript of October 6, on
17 7 and 8, Mr. Young stated, "I know in looking at this data
18 and talking with our field people of that 67, 55 are so
19 situated that they are systems that surround small systems
20 or franchises in this case. They are near or adjacent to
21 a larger lead community franchise."

22 There, he is referring to his regulated or his
23 unregulated systems. I believe his testimony was that of
24 the 67 unregulated systems or franchises I am not sure which
25 55 were situated near or adjacent another franchise or

1 system that impeded the ability of the unregulated systems
2 to achieve a rate increase. Is that correct? Is that your
3 understanding?

4 A Yes. The 12 that he was referring to were completely
5 unfeatured by rate regulation by any of the franchises served
6 by the cable system.

7 Q Was it not your understanding then that these systems
8 including the core city as well as the surrounding areas
9 were not subject to rate regulation either directly or
10 indirectly?

11 A I think that is what Mr. Young testified. It was
12 my understanding that that was the case.

13 Q Then by including only the core city franchise area
14 of these systems, does not this exhibit considerably under
15 estimate the number of subscribers in unregulated systems
16 operated by Mr. Young's company.

17 A Yes, it does.

18 Q Turning to Copyright Owners Exhibit R2, Mr.
19 Feldstein stated that this exhibit could not reflect a real
20 world situation because FCC regulations would have prohibited
21 a cable system from increasing its ESEs from two to five?

22 A From three to five. That is through January-June,
23 1980.

24 Q Assuming that that is a valid criticism, does it
25 change the point that you were trying to make from this

etp8

1 exhibit?

2 A Not at all, sir.

3 Q If whatever the FCC would have allowed if during
4 this period a cable system had increased its number of
5 distant signals by that amount under the NCTA's proposal
6 they would not be subject to an increase in the royalty
7 rate from this proceeding. Is that correct?

8 A That is correct. That is what the exhibit shows.
9 You might just as well, to add, if the date was January-June,
10 1980-2 when presumably, there would be no restriction, exactly
11 the same data would apply with the exception to the rate
12 of inflation.

13 Q Now turning to Copyright Owner Exhibit R4.
14 Mr. Feldstein was critical of your failure to include second
15 receipt revenues in this analysis.

16 A I don't have that.

17 Q You really don't need it. Was the purpose of this
18 exhibit to illustrate the proposal of copyright owners or
19 the proposal of NCTA?

20 A The proposal of NCTA.

21 Q Did you not use that data provided by NCTA that
22 was available?

23 A Every bit of it.

24 Q I believe counsel for NCTA intimated that there is
25 now a higher percent of systems in the higher payment

1 category than there would have been in 1976. Are you aware
2 of any data that indicates this situation?

3 A There is not the good base for 1976. I would
4 normally assume that with the number of cable subscribers
5 having increased between 1976 and 1980 by at least 50 percent
6 that the number of cable systems that are in the DSE category
7 would have substantially increased.

8 Q Correct. Now I believe Miss Beales testified that
9 there was some movement from the form 2 category to the
10 form 3 category, the DSE. That movement was taking place
11 at the back-end, wasn't there also movement in the front-end
12 of new systems coming into the form 1 category?

13 A Yes. There are new systems coming in and even
14 systems that would ultimately receive larger community may
15 be form 1s in the beginning as in the case of Chapel Hill.

16 Q So, for all we know, the percent of cable systems
17 that would fit into each one of these three categories today
18 might be the same as it was in '76?

19 A For all that I know it is possible.

20 Q Mr. Feldstein referred to or alleged that our
21 proposal would create more work for the Copyright Office and
22 that they would be required to check more calculations than
23 they now do. If that were to be true, who would pay for
24 the additional personnel required to perform the work?

25 A All the costs of the Copyright Office in this

etpl0

1 connection are paid by the copyright owners.

2 Q It would not be taxpayer money?

3 A Not a penny of it.

4 Q Mr. Cooper, I believe yesterday there was some
5 considerable exchange between you and Mr. Feldstein with
6 respect to whether our proposal was adjusting rates or adjust-
7 ing royalties. I believe Mr. Feldstein correctly pointed
8 out the statute does speak in terms of adjustment to the
9 rates. Does the proposal that you put forth on the
10 worksheet that you distributed yesterday have the same effect
11 as adjusting rates only you are making surcharge on the
12 royalty payment?

13 A It has exactly the same impact if the surcharge
14 percentage were applied individually to each of the rates of
15 the statute. The .675, 6.50s and .20s.

16 If you increase those, you come out to exactly
17 the same net effect as adding one percentage surcharge after
18 the calculation is made on the basis of the existing rates
19 in the statute.

20 Q In the proposal put forth by Mr. Korn as I recall
21 his worksheet placed a surcharge on rates. Is that correct?

22 A He made direct adjustment of the rates.

23 Q Now do I understand you correctly that you have
24 simplified that procedure by placing the surcharge at a
25 different point in the calculations?

40
1 A I have a high regard for the intelligence of
2 cable system operators. I think we still should try to
3 simplify the forms as much as we can.

4 Q Would you turn please to Copyright Owner Exhibit
5 R-10. That is Section B, Urichsville. Yesterday, Mr. Feldstein
6 asked you to consider a hypothetical. If I'm wrong in
7 characterising the hypothetical, counsel, please correct me.

8 I believe the hypothetical was if this system had
9 charged \$6.46 in 1976 as it was now charging under your
10 small system adjustment, there would be no increase in the
11 ceiling whatsoever; is that correct?

12 A That's correct. The average percent increase
13 would be 1.000.

14 Q If that hypothetical were to exist, what payment
15 category would the system have been in 1976, assuming rate of
16 \$6.46 and 4,395 subscribers.

17 A The answer is form three because the gross would
18 have been the same as shown here of 181,000.

19 Q So, under your proposed adjustment formula,
20 this hypothetical system would be the same category in 1980
21 as it would have been in 1976?

22 A Absolutely.

23 Q On this worksheet, you have listed in 1976
24 rate of \$5.50. Assuming that, I believe, that was not an
25 assumption, but an actual rate in 1976. What payment category

1 would that system have been in in 1976, assuming the same number
2 of subscribers?

3 A Since that difference certainly would fall into
4 the form two category.

5 Q As a result of your calculations here, it would
6 again fall into the form two category in 1980? Is that
7 correct?

8 A That is correct.

9 Q So, the value of the small system exemption to
10 the system would be the same?

11 A That's correct. It would have maintained the
12 value to that system.

13 Q As a final matter, Mr. Feldstein yesterday, very
14 perceptively identified what a percent to be a serious
15 anomaly in your rate adjustment proposal. That anomaly is
16 that systems with the same amount of gross revenues in 1980
17 might be paying different royalty paymetns as a result of
18 your adjustment. Conversely, that systems with different
19 gross revenues in 1980 might pay the same royalty fee.

20 A That's correct.

21 Q In 1980. Would you explain why that situation
22 does not exist?

23 A Well, it is a matter of tracking the statute.
24 Probably an easire way to illustrate it, if I may, is--I will
25 go to the board and try some figures here. Let's assume we are

1 dealing in 1976 with five systems.

2 Q Could you turn that a bit for Commissioner James?

3 A I'm sorry. 1976, we had four systems. The
4 first one had a first set subscriber rate of \$4. The second
5 one was \$5. The third one was \$6. The fourth one was \$7.
6 The same number of subscribers for each system.

7 - Assume that the system was a DSE system and paid
8 a royalty fee of one percent. So, for now, 1976, for the
9 royalty fee, it would be four cents and five cents and six
10 cents and seven cents. We go over to 1980 -- the same system,
11 the same DSEs, the same kind of one percent of gross receipts
12 is applicable. We now have all four of these systems charging
13 \$8. The one percent royalty fee is now eight cents for each
14 one of them. But, this is without having made any adjustment
15 for the inflationary affect upon the system.

16 Q Is the purpose of this proceeding to maintain
17 the real constant dollar value of the 1976 rate?

18 A That is correct.

19 Q What would be the real constant dollar value in
20 1980 of those 1976 rates?

21 A Well, if we were to assume that we are dealing
22 with an inflationary affect of 50 percent, the four cents
23 paid in 1976 would have a value of six cents. The five cents
24 would have a value of 7.5 cents. The six dollars would have
25 a value of nine cents. The seven dollars would have a value

1 of 10 and a half cents. The adjustment for inflation in
2 1980, assuming a 50 percent increase would be six cents,
3 seven and a half, nine and 10 and a half respectively.

4 It seems necessary, if you can make this adjust-
5 ment, to increase the payments by these systems and retain the
6 rates in these systems because they have kept up with inflation.
7 You have four systems which have the same gross receipts in
8 1980. In order to maintain the constant value of the
9 royalty payments paying different amounts of royalties under
10 our proposal.

11 Q Mr. Cooper, in 1976, because the statute
12 requires the royalty payment to be figured on a percentage
13 of gross revenues, then in that hypothetical, for instance,
14 assuming they all carried the same number of distant signals,
15 they are all paying a different royalty for the same number
16 of distant signals; is that correct? A different royalty
17 in dollars?

18 A Yes, at this time, they were paying a different
19 royalty in dollars for the same DSEs.

20 Q Is it not true that if there is an anomaly
21 present here in our adjustment formula, the anomaly is
22 created by the fact that in 1976 systems have paid a different
23 royalty fee in dollars, depending on their gross receipts.
24 In carrying that through, the real constant dollar adjustment
25 in 1980, they also pay a different royalty for the same number

1 of DSEs?

2 A That's correct. That is indicated by this
3 level which would make the adjustment to prevent the erosion
4 in the copyright owners, payments made to copyright owners.

5 The converse is also true. You could have had
6 systems in 1976 that paid the same amount of royalty fees.
7 You move over into a later year, assuming that they have
8 changed their rates and you will find that their copyright
9 royalty payments are identical. The situation with respect
10 to the DSE systems is substantially easier if you consider
11 only the DSE systems.

12 I think the statute is relatively clear. It
13 says that as I read it and we had the exchange before about
14 increase and decrease in DSEs, but the level of DSEs was the
15 same, identical in two periods, clearly the change in the
16 subscriber rate, the charge made by the cable systems for
17 basic services, it has not been kept up with inflation, then
18 an additional payment is required by the cable system.

19 MR. ATTAWAY: That is all I have on redirect.

20 Are there any questions from the Tribunal on this?

21 COMMISSIONER JAMES: Yes. On that \$4 system, what
22 actually would they pay in 1980, six cents?

23 THE WITNESS: No. Eight cents.

24 COMMISSIONER JAMES: On the second system, they pay
25 eight cents?

1 THE WITNESS: That's correct.

2 COMMISSIONER JAMES: On the \$7 system, what would
3 they pay?

4 THE WITNESS: 10 and a half cents.

5 COMMISSIONER JAMES: On the \$6, of course, they
6 pay nine?

7 THE WITNESS: The extent to which a cable system
8 has increased its rate beyond the inflationary level indicates
9 that no surcharge is necessary or indicated by the statute.
10 I think that that is clear in the statute. It is only when
11 the cable system increase in rates has fallen behind the level
12 of inflation that an adjustment is required.

13 It is true in a way that you are saying in this
14 kind of application that the copyright owners get benefit
15 of increases ahead of inflation, plus the opportunity to
16 bring everybody whose rates have not kept up with inflation
17 up to that level.

18 The anomaly of the Act takes a lot of that away
19 from us, though, in terms of the adjustment for small systems
20 that is required also by the Act. That, of course, goes in the
21 reverse direction to what we have been talking about. That
22 increase is the amount of the exemption and decreases the
23 royalty payment in cable systems. That protects so-called
24 small systems from being penalized by inflation.

25 On the other hand, large system exemption prevents

1 the copyright owners from being penalized by inflation.
2 The procedure that we are recommending would say the require-
3 ment of the Act, both with respect to the larger systems and
4 the smaller systems. We have tried to reflect it that way.
5 The alternative system that has been proposed and as referenced
6 yesterday, is to an industry-wide type of adjustment. An
7 industry-wide type of adjustment may or may not have any
8 difference in the overall impact upon the gross receipts of
9 the copyright owners.

10 However, in our opinion, it would not be fair
11 to individual cable systems whose rates have been maintained
12 at a high enough level to offset the affects of an erosion
13 in their payments of copyright fees.

14 COMMISSIONER JAMES: What result would you get?
15 In your hypothetical, ever system pays one percent?

16 THE WITNESS: That's correct.

17 COMMISSIONER JAMES: What would be the result if
18 you just applied the inflationary factor to that one percent?

19 THE WITNESS: It would increase the one cent to
20 one and a half percent.

21 COMMISSIONER JAMES: If you apply that?

22 THE WITNESS: If you assume an inflationary
23 chage of 50 percent.

24 COMMISSIONER JAMES: If you apply that inflationary
25 rate to the eight dollars that each system has now, what would

1 be the result?

2 THE WITNESS: In other words, what you are
3 saying, we change the \$8 to \$12 for all systems. I think it
4 would be a windfall. We would have windfall profits that
5 people would be upset about. I think what we are seeing
6 here is there are all kinds of difficulties we are working
7 with here. Here we are seeing, of course, that the increase in
8 the rate is 200 percent or 100 percent increase in the rate and
9 a 50 percent increase in the inflation rate. So, adjustment
10 is necessary. That is why that eight cents would apply
11 in line with what I have said before, Commissioner.

12 So, eight cents would stay in that case. In
13 here, we have an increase from \$5 to \$8. That is 60 percent?
14 It is something like that. Again, the eight cents would apply.
15 It is in these cases where the increase is less than 50
16 percent that we have the problem. If this were \$9,
17 there would be no adjustment. At \$8, we bring it up by
18 that difference from eight cents to nine cents. Here, where
19 there is no change in the rate and the rate has fallen
20 behind or here where it approaches the level of inflation, the
21 increases diminished.

22 There is another question, too, on how you
23 would interpret the Act as to whether or not the adjustment
24 have to be made individually or for an industry-wide basis.
25 That is a question for you people to determine.

1 COMMISSIONER JAMES: The rate as it now applies
2 is now on an industry-wide basis; isn't it?

3 THE WITNESS: The rates in section 101 are for
4 all systems.

5 COMMISSIONER JAMES: That is industry-wide?

6 THE WITNESS: That is correct.

7 - COMMISSIONER JAMES: But, your proposal is
8 tantamount to us setting a rate almost on a system by system
9 as the categories they fall into?

10 THE WITNESS: Yes. In order to provide,
11 reflect the extent to which some systems have increased
12 their rates and thereby, just by the fact of increasing,
13 they have increased their royalty payments to us, assuming
14 the DSE levels are the same. Cable system, which have not
15 increased their rates on the other hand, the value of
16 the royalty payments they make to us, the dollars they pay
17 would be the same from 1976 to 1980 or 1981. The value
18 of those royalty payments would have been eroded by inflation.

19 COMMISSIONER JAMES: It seems to me from a
20 cursory view of Congress, in their wisdom to set a rate industry-
21 wide, and we all agree as to the fact there has been an
22 inflationary fact since '76, the simple way to lay the rate
23 to the original rate set by Congress and let the chips fall
24 where they may.

25 THE WITNESS: As I indicated earlier, I don't

1 think it would make a significant difference as far as
2 we are concerned, Commissioner James. Were you using
3 the CPI increase for individual system rates or the CPI
4 to adjust the rate in the current statute? It is just a
5 matter of equity. Perhaps we are worrying about cable
6 systems than NCTA is.

7 COMMISSIONER JAMES: I think, as I recall from
8 your exhibit yesterday, some of the changes in your proposal
9 primarily would get at the additional revenue by setting up
10 the various categories. The revenue will increase by
11 requiring the cable systems to report various levels of
12 income.

13 Am I correct in that assumption?

14 THE WITNESS: No. They would still report their
15 gross receipts. The gross receipts they would report would
16 be exactly the same gross receipt they would report under the
17 current statute and forms. There would be no change.

18 COMMISSIONER JAMES: How do you get tiering
19 under the current form?

20 THE WITNESS: They are supposed to report tiering.

21 COMMISSIONER JAMES: This is a verification.

22 A Yes. All we are trying to do here in terms of
23 where we are facing, the problems with universal free rates
24 or a very, very low rate. The only way we can make adjustment
25 that would be equitable to the copyright owners would be to

1 use this. Make an assumption that the rate in effect in
2 1976 for all subscribers was at the level of \$6.60 or Mr.
3 Feldstein may previous, \$6.48.

4 We make the comparison versus the actual
5 rates being charged subscribers in 1980, '81 or '82. If the
6 rate is free in 1982 or it is \$2.95, then the percentage
7 change from 1976 to 1980 will be reduced.

8 That would make an automatic adjustment for the
9 tiering for giving away our programs. I have no problem
10 with cable systems giving away our programs for nothing if
11 that is what they are doing. The only problem it is not
12 their programs they are giving away, but ours.

13 COMMISSIONER JAMES: Let me go back. It
14 seems you are trying to do two things with your proposal.
15 The first thing you are trying to do is make sure there
16 is an adequate reporting of gross receipts. A cable system
17 on the current form gives just a gross receipts statement
18 without any indication of how they arrived at that gross
19 receipts, that leaves the copyright owners in some doubt as
20 if all the receipts that a cable system would receive under
21 the tiering method are being adequately reflected in the
22 form.

23 THE WITNESS: That is not quite so. The
24 primary reason for the change in the form was to be able to
25 calculate for a cable system the average rate charged a

1 a subscriber for basic service for the first set. You
2 couldn't do that from the existing form. That is what block
3 one of our proposal would enable us to do, determine the
4 average rate charged by a cable system to subscribers for
5 basic service for the first set.

6 COMMISSIONER JAMES: In different categories?

7 THE WITNESS: Yes. The categories would differ
8 in terms of facilitating the entry of a cable system. You
9 would enter the number of subscribers that paid a different
10 first set rate. If the first set rate was zero in the case of
11 a system with universal service, you would enter zero as the
12 rate and zero as the gross receipts. That would ultimately
13 be reflected when you total the number of subscribers and the
14 gross receipts for basic service for the first set.

15 It was not the intention of the change in
16 Section E to aid us or collect additional revenues from
17 cable systems. We are assuming the gross receipts they are
18 reporting now are accurate.

19 COMMISSIONER JAMES: Why not just have gross
20 receipts? Why do you have the --

21 THE WITNESS: If they gave me gross receipts, yes.
22 If I could start on the bottom line and say give me the
23 number of first set residential service subscribers, enter
24 this on line X. Give me your gross receipts for the first
25 set service paid by those subscribers. Then, to that and

1 to the differential, no problem at all. I think we
2 have done by showing categories is facilitate entry of all
3 pertinent data required to make those two totals. The
4 total number of subscribers receiving basic service and two
5 the total receipts from first set subscriptions.

6 COMMISSIONER JAMES: Let's take one of your
7 hypotheticals. If the basic service rate is zero and they
8 don't pick up anything until they tier it up two levels, how
9 would that cable system have reported under the old form?

10 THE WITNESS: Under the old form? Under the old
11 form, it is difficult to say. They would have a number of
12 subscribers. They show a rate. Maybe they might show at \$6.95.
13 They might show 500 at \$7.75. I have not seen any yet, but
14 under a hypothetical situation, they might show 300 at zero
15 under the existing form.

16 THE WITNESS: They could do that. The
17 existing forms provide for them to make such an entry.

18 COMMISSIONER JAMES: The existing form does
19 provide?

20 THE WITNESS: Yes.

21 COMMISSIONER JAMES: 300 and zero.

22 THE WITNESS: In theory, that is what it does.

23 COMMISSIONER JAMES: I thought it was all
24 lumped together on the form.

25 THE WITNESS: No, sir. The form asks for number

1 of subscribers and the rates charge for each category
2 of service. You will see there in some of the reports.

3 MR. ATTAWAY: I think you are in error.

4 COMMISSIONER JAMES: I think so, too, sir. I
5 think your new form gives you that information, but your
6 old form does not.

7 THE WITNESS: I was referring to one of the
8 Times-Mirror systems, Rancho Palos Verdes.

9 This listed some four different or three different
10 categories of service with different rates in those blocks.
11 I think our present form we propose would handle this.
12 The existing form, I'm not sure what it does.

13 COMMISSIONER JAMES: I looked at the existing
14 form. What you would get on a gross revenues is 593 times
15 \$6.95 and 500 times 575. You just get a gross revenues.

16 THE WITNESS: No. There is no listing of gross
17 revenue on block E.

18 COMMISSIONER JAMES: No.

19 THE WITNESS: The only gross revenue figure that
20 is asked for in the form is the gross revenue for everything
21 combined. The additional sets, converter rentals, commercial,
22 motels, hops, et cetera.

23 COMMISSIONER JAMES: Yes. Under your form though
24 if we adopt it as far as listing those categories we can
25 probably -- anybody can accurately compute by applying the

1 the numbers for it and see if the gross revenue numbers
2 are correct.

3 THE WITNESS: The problems that you have, and
4 I'm not trying to belabor this thing. These things fluctuate.
5 For example, during a six-month period, the rate might go from
6 625 to 695.

7 COMMISSIONER JAMES: Let's say for this discussion
8 so I don't get confused, they remain the same. They do not
9 change. There is no way in looking at the existing form that
10 you could go back and multiply and get the amount of gross
11 to check it out because I have done it.

12 THE WITNESS: You can't do it.

13 COMMISSIONER JAMES: It appears if we adopt your
14 form, we have some basis or you, the copyright owners, would
15 have some basis of accurately checking if the gross receipts
16 equal the number of subscribers at the different rate. Am
17 I correct or am I wrong?

18 THE WITNESS: It would help us to do that, yes.

19 COMMISSIONER JAMES: All right. One of your
20 purposes then of changing that form I would have to assume is
21 to have some verification of what the gross receipts were?

22 THE WITNESS: Yes. You would be able to understand.

23 COMMISSIONER JAMES: That was my first question.

24 The second thing I think your proposal is
25 trying to do, and I'm having some difficulty with it, is that

1 you are trying to apply a surcharge when I think the
2 statute says we have to deal with that overall rate. You
3 are changing it from a system-wide application of a rate to
4 an individual system by system or in certain categories.
5 That is why I want to come back to my first question.

6 Forget the windfall. Isn't it a lot of
7 systems to apply the inflationary rate to the rate Congress
8 set and let it go system wide?

9 THE WITNESS: It certainly is easier.

10 COMMISSIONER JAMES: Thank you. That's all the
11 questions I have.

12 CHAIRMAN BURG: I would like to pursue that.
13 I can see where it is simpler. What about a system that has
14 maintained the rates or kept up with the cost of inflation?
15 We apply a surcharge to that system? At least, it seems to
16 me, from a consumer standpoint, that those people were over-
17 doing. They have done what has to be done. We are penalizing
18 both the system and the consumer.

19 THE WITNESS: I think that's the problem,
20 Madam Chairman, that we were trying to correct. The only
21 solace you can have is the fact that the copyright rate set in
22 the statute are pittance. We are dealing as testified here--

23 CHAIRMAN BURG: That's really beside the point.
24 That's what we are dealing with. We are dealing with what is
25 in the statute now, right or wrong.

1 THE WITNESS: You are dealing with perhaps one
2 percent or some amount like that. But, it is true. That is
3 our concern for the cable system operators and the consumers,
4 the extent to which cable systems that have maintained the
5 rates and their payments to us on a basis that has not allowed
6 them to erode is penalized.

7 CHAIRMAN BURG: What about the regulatory constraint?
8 Those stations, they may well be few in number, but
9 obviously, there are some who have petitioned for an increase
10 and been denied that increase. We say to them in effect
11 you are charging \$4.75.

12 THE WITNESS: I think there is very little
13 evidence that has been submitted in this proceeding that
14 regulated stations or regulated cable systems, rather have
15 been worded by regulating authorities from achieving reasonable
16 rate increases. The comparisons that we have made, that NCTA
17 has made, indicates that in the preponderance of instances of
18 which regulated cable systems have requested rate increases, these
19 have been granted in excess, I believe. And I will be
20 conservative, 95 percent of the amount requested was granted.

21 CHAIRMAN BURG: There are some that have had their
22 petitions for a rate increase denied.

23 THE WITNESS: That's true.

24 CHAIRMAN BURG: What happens if we apply the
25 flat surcharge across the board?

1 THE WITNESS: They will also be not penalized.
2 You will, at least, be applying what the statute had in
3 mind. Where the cable systems rates and therefore its gross
4 receipts and paymens have not gone up because of inflation
5 or because of the action of regulating authorities, the
6 copyright owners are being penalized.

7 CHAIRMAN BURG: Wait a minute. Don't get ahead
8 of me yet. My mind does not work as fast as yours.

9 Would one of the learned counsel in this room who
10 has the authority, if the local authority denies the rate
11 increase and we apply a surcharge, which jurisdiction would
12 prevail?

13 COMMISSIONER JAMES: Ours.

14 MR. ATTAWAY: I don't understand the question.

15 COMMISSIONER JAMES: They have to pay it.

16 MR. FELDSTEIN: They have to pay it.

17 MR. ATTAWAY: Oh, definitely.

18 CHAIRMAN BURG: The City Council or the other
19 jurisdictions say no.

20 COMMISSIONER JAMES: Let me ask a question to
21 clarify. The royalty payments, are they considered an
22 operating expense of cable systems?

23 THE WITNESS: I'm sure they are.

24 COMMISSIONER JAMES: If a cable system has five
25 employees and they hae gotten periodic increases because of

1 inflation, that would increase their operating expenses?

2 THE WITNESS: Yes.

3 COMMISSIONER JAMES: If they paid for wire
4 \$10 a hundred yards and are now paying \$20 a hundred yards,
5 that is the cost of doing business.

6 THE WITNESS: That is correct.

7 COMMISSIONER JAMES: No rate increase by
8 the City Council or whatever regulatory body would give them
9 any relief on that? If they don't give them an increase those
10 costs go way up.

11 THE WITNESS: If they don't receive an increase
12 or just the cost of the operating goes up, right.

13 COMMISSIONER JAMES: If we raise the rate and they
14 get no increase, that is just the cost of doing business.

15 THE WITNESS: That's correct.

16 CHAIRMAN BURG: I was not referring to the royalty.
17 I understand they are going to have to pay the royalty
18 costs. I was talking about the rate. We couldn't impose
19 a new -- if we say the surcharge is above whatever the rate is
20 and the regulatory agency turns that increase down, they would
21 prevail; would they not?

22 COMMISSIONER JAMES: In that regard, yes.

23

24

25

dmm-1 1 MR. FELDSTEIN: Madam Chairman, Mr. Attaway and I were
2 talking. We think the answer to your question is that if a rate
3 increase is imposed by this Tribunal that is paid by the cable
4 operator. It does not increase the local subscriber rates that
5 the operator gets from subscribers. He's not allowed to pass
6 it on.

7 CHAIRMAN BURG: That's precisely what I'm asking.

8 MR. ATTAWAY: This Tribunal could not require a
9 franchising authority to grant a subscriber rate increase.

10 CHAIRMAN BURG: I was not talking about the copyright
11 royalty. I know that has to be absorbed some way.

12 THE WITNESS: In cases where rates are pegged on
13 return of investment or some sort of a profit margin. If the
14 cable system were required to pay a higher copyright royalty fee,
15 this might be taken into consideration by the regulating
16 authority in terms of when it reviews that cable system's rate
17 request. It should have no direct impact or not be passed along
18 by you to subscribers.

19 CHAIRMAN BURG: What I'm trying to get at though is
20 an overall flat surcharge has built-in inequities, does it not?

21 THE WITNESS: That is our feeling Madam Chairman. It
22 is at the same time the only saving grace. It is inequity that
23 is on a relatively small percentage of the gross receipts of the
24 cable system.

25 CHAIRMAN BURG: Let's go back momentarily to your
proposal. The cable system operator we know we attached a CPI

1 Index of whatever 15 percent or whatever. That person would have
2 to sit down and go through all of these computations that you
3 gave an example of in your form?

4 THE WITNESS: You would have to make four calculations
5 that he does not make now.

6 CHAIRMAN BURG: You said it was based on the intelli-
7 gence of a 12-year-old.

8 THE WITNESS: They are simple division or multiplica-
9 tion. It is long division.

10 CHAIRMAN BURG: So, they do it. Then it arrives at the
11 copyright office. There is no varification over there if those
12 are correct.

13 THE WITNESS: Yes they would. As we have indicated on
14 the bottom of block E the cable system would now have indicated
15 the average subscriber rate now. The average subscriber as it
16 said it was in a previous time period. Make this computation
17 to 1.011 percent.

18 The copyright office absolutely would check that calcu-
19 lation. They plug the same numbers in and see that they get the
20 same result. That they do.

21 CHAIRMAN BURG: Mr. Sampson said yesterday they check
22 what is on the paper. They don't know that those facts are
23 accurate.

24 THE WITNESS: They do some checking. It is only on the
25 basis of what is reported. What is reported they examine with
considerable care.

dmm-3 1 They are to be commended considering the volume of
2 paper that comes in and the shape that some of the forms are in.
3 I think they do a conscientious job.

4 For example on the system we dealt with yesterday. The
5 Alamogordo System. Over and above tiering they had station KPEM
6 the call letters Mexico City, as local station in Alamogordo. The
7 copyright office corrected this. They called this to their
8 attention and said this is not a local signal.

9 The cable system did agree and in a subsequent presen-
10 tation the combined reported corrected that DSE figure. They do
11 that and do it carefully.

12 CHAIRMAN BURG: Predicating on the information at hand.

13 THE WITNESS: They make no effort of going to outside
14 sources to check the accuracy of the data reported. When I say
15 that, that is not quite true either.

16 They will take a factbook for example and look at a
17 station listing and check a caller if they suspect that either
18 cable system has written it in incorrect or what have you. But
19 they will not, for example, check to see if most signals are
20 distant or local. It is not their concern.

21 COMMISSIONER COULTER: Mr. Cooper briefly to clarify
22 confusion I had yesterday. On the gross receipts limitations for
23 form two, your formula here makes an adjustment. There are three
24 categories mentioned monetary inflation or deflation or changing
25 in the average rates charged.

Your formula is based only on changing in the average

1 rate charge and not based in any way upon inflation?

2 THE WITNESS: The formula, the determination as to
3 the form, the statement of account form that a cable system
4 files in our calculation is based on just those two factors.

5 The statutory ceiling as stated in the Act and the
6 increase in rates by the cable system.

7 BY COMMISSIONER COULTER:

8 Q Is it totally unrelated to inflation?

9 A The determination of which statement of account to
10 file. Ultimately the payments made by those systems do take
11 inflation into account, both the small systems and the large
12 systems. But the determination as to whether it is a form one,
13 form two or form three system in our proposal does not take
14 inflation into account.

15 Q To nail this down, the gross receipts limitations in
16 your formula does not take inflation into account. It is not
17 based upon inflation?

18 A No. It is merely to protect cable systems, to preserve
19 their exemption when they increase their rates. To the extent
20 that is permissible.

21 Q It is not related to inflation?

22 A It takes into account the extent to which a cable
23 system has modified its rates from the periods concerned, but it
24 does not there bring in an outside index to determine whether
25 that change exceeded or was less than inflation.

Q On the exhibit R-2 again just clarifying, from your

1 exchange with Mr. Feldstein, the increase in whatever. There
2 has been no appreciable effect upon increase in revenues from
3 1976 to 1980 based upon the increase in DSEs? Is that a correct
4 statement?

5 A As soon as I get R-2 I can follow you.

6 The assumption is, as shown on line three, that rate
7 remains the same at \$5.00 in each of those three columns and
8 the number of subscribers remains constant.

9 So the gross revenues would remain the same.

10 Q No. I'm talking about the real situation. There has
11 been in reality no appreciable change? The increase in revenues
12 by all cable systems has not been appreciably altered because
13 of increase in DSE between 1976 and the present?

14 A I told you, Commissioner Coulter, that I'm concerned
15 about the 1976 because it is incognito for me. The DSEs that
16 cable systems are carrying since the FCC adopted the rules which
17 are currently in the process of changing the number of DSs that
18 cable system carry has increased substantially.

19 I don't know whether it has increased substantially
20 in the last two years or whether it is going to increase substan-
21 tially this year versus next year. That I don't know.

22 Q That is looking into the future not as far as the
23 past is concerned.

24 A I can't go retrospectively. I can go only from the
25 two years 1978 and '79 that cable systems have been paying
copyright. From what I have seen there has been a slight

dmm-6 1 increase. I mean slight. Perhaps one quarter of one DSE in
2 the DSE carriage by long form cable systems.

3 Q I made a mistake. I meant royalty payments when I
4 was talking about gross receipts. The increase in royalty
5 payments has not been appreciable particularly effective by the
6 increase in DSEs?

7 A No. I think the primary reason royalty payments have
8 gone up is because of the increase of subscribers.

9 Q The reason I just wanted to pursue that was to get
10 some sense as to whether the problem you were trying to illus-
11 trate in this exhibit was related to the future or more than
12 it was to the past.

13 A It is related very much more to the future than it is
14 in the past. The future when cable systems will not have any
15 restrictions upon a number of DSs they can import. Number one.
16 Number two, the extent to which cable systems as you now know
17 are talking about 35 channels. 85 channels. 200 channels of
18 service being put into a market. They are going to want to use
19 every bit of programming they can get their hands on in order
20 to fill those channels.

21 Q Isn't that problem addressed in another part of the
22 Act? When the FCC if and when they deregulate there is a whole
23 new aspect of the Act that comes into play.

24 My question is really whether the problem you are
25 alluding to here one that even concerns this proceeding?

A Okay. That is a very good question. As we have

1 indicated there are grandfathered cable systems and others that
2 are carrying a substantial number of DSEs now. There are no
3 limitations.

4 You saw that Almagordo example that had 8.25 DSEs
5 including the tiered system. So, it is something which exists
6 today. It is something which needs to be considered.

7 I think that you are right. Increases in the number
8 of DSEs and the DSs imported solely as a result of the change
9 in the FCC regulations would be another issue for you to examine
10 separately.

11 Right now cable systems have an opportunity for signals.
12 They can go within existing regulations from zero to two and a
13 half DSE which is exactly the same kind of situation we are
14 dealing with now in real life.

15 All we are dealing with here is the change of two
16 DSE. It does not necessarily have to be the change from three
17 to five. The impact would be similar from zero to two which
18 is in existing regulations and is happening all the time.

19 MR. ATTAWAY: Madam Chairman, if I would have a minute
20 or two and with permission of counsel I would like to correct
21 a possible misstatement Mr. Cooper made with respect to the
22 effect of across the board adjustment as compared with our pro-
23 posed adjustment of copyright owners.

24 I will try not at all to be argumentative but just to
25 correct the error. There is a difference. The difference is
that we would as copyright owners prefer a self-adjusting

dmm-8 1 mechanism because the Tribunal has to consider two factors. It
2 has to consider inflation and it has to consider the average
3 rates charged cable systems.

4 Mr. Feldstein says that you should also consider
5 several others. But looking at those two if you do an across
6 the board adjustment, periodically whether it be every six
7 months, every year or every five years, you would have to do
8 a survey as you have done this year to determine what percentage
9 increase in subscriber rates has taken place over the period
10 in question.

11 That introduces an element of lag between the periods
12 for which you are adjusting and the times the adjusting is
13 actually made. That would have an effect on copyright owners.
14 Am I making sense? Is that clear?

15 CHAIRMAN BURG: Yes.

16 MR. ATTAWAY: So, there would be a difference to us.

17 CHAIRMAN BURG: Thank you. Thank you Mr. Cooper.

18 We will recess until 2:00 o'clock.

19 (A lunch recess was taken until 2:00 o'clock.)
20
21
22
23
24
25

1 CHAIRMAN BURG: Back on the record.

2 Seeing Ms. Beales has already been sworn, we will pro-
3 ceed with you, Mr. Feldstein.

4 MR. ATTAWAY: Excuse me, Mr. Feldstein.

5 Madam Chairman, I would like to note my objection
6 to the presentation of Ms. Beales as a rebuttal witness. She was
7 afforded an opportunity to rebutt the direct case of Copyright
8 Owners and reflected in the record of October 2nd, pages 8 thru
9 21, I think to give her a second opportunity to rebutt testimony
10 is prejudicial.

11 MR. FELDSTEIN: Much of what she will present has not
12 been rebutted. What she presented before, if Mr. Attaway thinks
13 it abutted his case, so be it. She is going to make points
14 that have not been made and have been made and we will think is
15 a valid exercise.

16 CHAIRMAN BURG: We will proceed. We will take it
17 into consideration. We will proceed.

18 DIRECT EXAMINATION

19 BY MR. FELDSTEIN:

20 Q Now, Ms. Beales, the copyright holders, through the
21 testimony of Mr. Valenti referred to and then submitted for the
22 record a copy of the then most currently available Warburg Pari-
23 bus Becker Report on the cable television industry. Have you
24 examined this report?

25 A Yes, I have.

nlw-2

1 Q The Copyright Owners have testified to and this
2 report confirms that there has been an increase in the profits
3 of most of the major cable television companies. Does this
4 report say why the profits of these companies have increased?

5 Q Well, on page three of the report, there is a para-
6 graph explaining their four reasons for the increases in the
7 value per subscriber and operations income.

8 Q Would you relate those to the Tribunal?

9 A Yes. There is, from Warburg Paribus Becker Cable
10 Television 1979 investment opportunities in a growth industry
11 from page three. These increases in value per subscriber and
12 operating income multiples reflect, one, the value added by
13 the addition case flow from pay television and other non-basic
14 services, two, greater buyer demand generated by interests out-
15 side the CATV industry wishing to invest in cable television
16 profits, three, lower interest rates for borrowed money than
17 existed in the early 1970s and, four, a greater availability
18 for long term finance for the cable television industry in
19 general.

20 Q Of those four factors, only one mentioned program-
21 ming, that was the addition of extra services?

22 A The additional cash flow from pay television and
23 other non-basic services.

24 Q Is there any mention in there of the additional sub-
25 scribe factor which Mr. Cooper testified to?

A No. He only mentions in terms of that are pay

Accurate Reporting Co., Inc.

(202) 726-3801

1 television and other non-basic services.

2 Q . None of the other free factors related to that?

3 A . That is correct.

4 Q The copyright holders presented evidence as to the
5 profits of the cable television industry thus the Warburg Pari-
6 bus Becker Report to which we have just referred. Toward the
7 end of the direct case of the cable industry, we were permitted
8 in a ruling by the Chair to show the increase in the same period
9 the profits of one major copyright holder. We had a person on
10 the stand who worked for that major copyright holder. That was
11 Mr. Addiss of Warner who testified about the increase in profits
12 for Warner Communications.

13 Have you been able to examine information on other
14 major copyright holders?

15 MR. ATTAWAY: Again, Madam Chairman, I object to
16 this line of questioning. The profits of any copyright owners
17 are totally irrelevant to this proceeding for the same reasons
18 I gave the last time I made a similar objection.

19 CHAIRMAN BURG: Mr. Feldstein, I think in this regard
20 I am going to sustain that objection.

21 MR. FELDSTEIN: We were permitted on Friday afternoon,
22 October 3rd to place in the record in a reversal of your earlier
23 ruling the profits of the increase in profits of Warner Communi-
24 cations. Had I been permitted to do so earlier in the week when
25 the ruling went the other way, I would have presented profits

nlw-4

1 of some of the major copyright holders as profits of some of
2 the major Copyright Owners. I wanted to place in evidence some
3 of the profits for these companies.

4 MR. ATTAWAY: As a matter of presenting rebuttal
5 testimony, I don't think the Copyright Owners, in their direct
6 case, ever put into issue the profitability of motion picture
7 companies. Therefore, I don't see anything in this regard for
8 CTA to rebutt.

9 MR. FELDSTEIN: The ability to pay and the need to
10 be paid were tied tangentially. The Copyright Owners have con-
11 tinued to make the point about not adequately being compensated,
12 about penance to quote Mr. Cooper that we are paying.

13 It seems to me, once we are allowed to bring Warner's
14 profits into the record, we ought to be permitted to bring the
15 profits in of some other major companies.

16 CHAIRMAN BURG: The Tribunal is going to sustain the
17 objection.

18 BY MR. FELDSTEIN:

19 Q Ms. Beales, have you examined the form 10-K in the
20 annual report for 1979 for any of the major copyright owners?

21 A Yes, I have.

22 Q Were there any mentions of cable television in those
23 reports?

24 A Yes.

25 Q Would you please tell the Tribunal what was, in

1 general, stated in these reports as regards cable television?

2 A I examined the 10-K forms for the ten large copyright
3 owners and looked at information contained in the sections as
4 to future business prospects and what would be affecting their
5 business down the road.

6 On the plus side, cable television in specific, pay
7 cable, was listed often as a contributing factor to future pro-
8 fitability of the companies.

9 MR. ATTAWAY: Madam Chairman, it seems to me the
10 counsel is merely trying to get into the same room by using a
11 different door.

12 MR. FELDSTEIN: The question is not going to profits,
13 not increase in revenue, but cable television is looked as af-
14 firmative or negative by the Copyright Owners with regard to
15 their business. It is not a question involving what happened
16 between '76 and '79 to the profits.

17 MR. ATTAWAY: In that case, I would like to establish
18 what relationship this has to rebutting our direct case.

19 MR. FELDSTEIN: You have alleged the harmful use of
20 your profit. Mr. Valenti stated that we did not compensate you
21 and that we harmed you by using your profit in the case of
22 secondary transmissions. I am attempting to rebutt that by
23 showing in your 10-K by file the Security and Exchange Commis-
24 sion there is no negative mention of cable television but positive.
25 That rebutts Mr. Valenti's remarks.

nlw 1 MR. ATTAWAY: Mr. Valenti remark was to harm the
2 Copyright Owners as a result of DS transmissions. If there is
3 anything in this 10-K report, DS retransmissions, perhaps that
4 would be in order.

5 BY MR. FELDSTEIN:

6 Q Ms. Beales, was there anything in the 10-K regarding
7 the harm that DS retransmission done to the Copyright Owners?

8 A I was unable to find any mention in that and particu-
9 larly checked with sections focusing on future competitive
10 forces that might affect business in a negative aspect. I did
11 not find mention of cable television in any one.

12 MR. FELDSTEIN: I am going to distribute copies of
13 three exhibits. They are related. We will refer to them to-
14 gether.

15 COMMISSIONER GARCIA: Ms. Beales, I missed the first
16 part of that. Which 10-K did you review?

17 THE WITNESS: The ones filed at the Security and
18 Exchange Commission.

19 COMMISSIONER GARCIA: From whom?

20 THE WITNESS: Columbia Pictures, Metro-Goldwyn-Mayer,
21 Paramount Pictures, Twentieth Century Fox, Viacom International,
22 Walt Disney Productions and Warner Communications.

23 COMMISSIONER JAMES: I have a question. I am trying
24 to understand what importance this has. In the 10-K, if a sys-
25 tem indicated they had \$90 million from cable and believe they

nlw-7 1 should have gotten \$100 million. Would that have been reflected
2 in there? .

3 THE WITNESS: In the competitive forces section, they
4 talk about what factors might affect their business, a change
5 in demand, a change in viewer taste, that sort of thing. That
6 is where I look to see if any particular cable was mentioned as
7 a harm to their business on the horizon.

8 COMMISSIONER JAMES: If they are getting, they are
9 going to get something. The law now says they have to pay. A
10 year ago, they paid \$14 million. If they thing she should have
11 gotten \$100 million, would that have been reflected in there?

12 THE WITNESS: I don't know how they would have filled
13 that out.

14 COMMISSIONER JAMES: I am trying to understand what
15 is the importance of your testimony on the 10-K?

16 THE WITNESS: They get something. They have to come
17 back to a governmental regulatory agency to get more.

18 COMMISSIONER JAMES: How would that be reflected in
19 the 10-K so it would be important to us?

20 THE WITNESS: No. We look for competitive factors
21 like a decrease in their audience because it was being shown on
22 cable, competition, not what they are making from it right now
23 or what they are not making from it right now.

24 COMMISSIONER JAMES: I don't see the important of the
25 10-K. Nevertheless, go on.

nlw-8

1

MR. FELDSTEIN: Commissioner James, I was busily

2

engaged in dispensing papers. The reason for the 10-K informa-

3

tion was not the adequacy or inadequacy of the copyright pay-

4

ments. It was to the effect that since Mr. Valenti alleged

5

that movement of DS around the country is harmful to their busi-

6

ness, that I was trying to point out through the witness that

7

those things which are harmful to the business and competitive

8

threats are supposed to be narrated in the competition section

9

of 10-K. Cable television is simply given no mention.

10

COMMISSIONER JAMES: Okay.

11

BY MR. FELDSTEIN:

12

Q The first chart we have before you, NCTA R-3, is a

13

prelude in that it reviews again for the Tribunal, refreshes

14

the Tribunal's mind as to the right fee per subscriber showing

15

which NCTA made for 1976 and 1980.

16

Ms. Beales, will you please quickly refresh us on

17

those figures and where they came from?

18

A The 1976 estimate that NCTA relied on was listed

19

in the legislative history in the House report. \$8.7 million

20

in royalty fees were anticipated to be collected in the full

21

year. 10.8 years is the figures used in the report as of the

22

first of the year 1976. Dividing these numbers out, comes out

23

with a royalty fee per subscriber of 81 cents. For the 1980,

24

NCTA relied on are from statement of account form 1979-two report

25

periods. Those are listed at the top of the column from 1980.

1 Six-month period, \$7.6 million was collected and
2 13.9 million subscribers were reported on the forms we examined.
3 We examined about 4,000 forms. The royalty fee per subscriber
4 for 1980 using information that goes up to the end of 1979 is
5 \$1.08 reflecting a 30 percent increase.

6 Q Mention was also made although no specific figures
7 were-available; something questioning as to whether these 1979-
8 2 statement of account forms could be relied upon in order to
9 produce the royalty fee per subscriber as of December 31, 1979.
10 You stated that a check on the accuracy of that data might be
11 made using Factbook information.

12 A Yes.

13 Q Were you able to do that?

14 A Yes. The bottom portion of this chart utilizes the
15 full year royalty payments paid by cable systems to the copy-
16 right office of \$5.4 million in royalty fees. It relies on the
17 1980 Factbook for the subscriber estimate of 14.1 million sub-
18 scribers as of January 1, 1979, utilizing the same methodology
19 in deriving the subscribers that the Factbook used in 1976. That
20 produces a royalty fee per subscriber of \$1.09, very close to
21 the \$1.08 and a 35 percent increase over 1976.

22 COMMISSIONER JAMES: Excuse me. If you take 7.5 and
23 divide by 15.9---

24 MR. FELDSTEIN: You get 54 cents.

25 THE WITNESS: Is is a six-month figure. The one

nlw-10

1 dollar figure is analyzed which I failed to point out. I am
2 sorry. I meant to label that.

3 BY MR. FELDSTEIN:

4 Q Thus, Ms. Beales, the Factbook methodology very
5 closely tracks the statement of account methodology; is that
6 correct?

7 A Yes.

8 Q Turning to NCTA are 3-A, there has been an effort
9 made today and previously by the Copyright Owners to state that
10 the number of subscribers as of in 1976, as of the enactment
11 date was larger. After all the legislative history used 10.8
12 million which we have seen were the number of subscribers as of
13 January 1, 1976.

14 Have you been able to determine how many subscribers
15 there were as of the date of enactment, October, 1976?

16 A There is not a precise figure that has been pub-
17 lished by the Factbook. However, if you use the 1977 Factbook
18 as a base, you can estimate and they provide a September, 1976,
19 figure. You can estimate the October, 1976, figure at 11.6
20 subscribers.

21 Q If you use that higher subscriber total and with the
22 8.7 million estimated copyright collections, what then would
23 your royalty fee per subscriber have been?

24 A 75 cents.

25 Q Thus, a more accurate subscriber total would have

1 resulted in an even lower royalty fee per subscriber?

2 If that would, how would that affect the increase
3 in the royalty fee per subscriber between '76 and '80?

4 A It would have been higher, an important point. If
5 you count 1980, of course, it would have been even higher. All
6 of our data on the 1980 estimate of royalty fee per subscriber
7 relies on information going up through the end of 1979. It
8 does not reflect any information for the year 1980. We have
9 through our track records that the royalty fee per subscriber
10 has been steadily increasing.

11 If we were able to use 1980, had it been available,
12 I would feel confident in predicting that would be even higher.

13 Q Would you please turn to NCTA Exhibit R-4. It will
14 recall during Ms. Beales direct testimony that Commissioner
15 James noted that her 1979-2 or 1980, if you will, royalty fee
16 per subscriber calculation was based on simply tallying up the
17 number of subscribers reporting on the form, on the copyright
18 forms and to the lining up the number of dollars collected and
19 dividing. Commissioner James asked what the result would be
20 if you did the individual calculation for each system and then
21 got an average of the royalty fee per subscriber. Have you done
22 this?

23 A Yes, I have.

24 Q Would you please describe the results of this to the
25 Tribunal?

nlw-12

1 A We have within each category in the left-hand column
2 the totals that were originally presented. These were analyzed
3 totals and the result of total lining up all the subscribers in
4 each category, all the royalty pay and then dividing. In the
5 right-hand column, we have results average of average for each
6 individual system. We derive the royalty fee per subscriber and
7 average that.

8 As you can see, the numbers on an analyzed basis
9 are relatively close to the original numbers.

10 Q Thus, since I recollect testimony that DSE systems
11 pay approximately 90 percent of the copyright royalties, the
12 dollar eight that you got from using your totalling method
13 would have been slightly higher using Commissioner James's
14 suggested method?

15 A That is correct.

16 Q The conclusion of this part of your testimony then,
17 Ms. Beales, you have done the 1980 royalty fee per subscriber
18 three different ways and have come up with various similar
19 answers; is that correct?

20 A That is correct.

21 Q Mr. Cooper has testified both on direct and on re-
22 buttal that he believe that regulatory restraint, although
23 named in the statute as a relative factor in mitigation is a
24 factor not to be considered at this time by this Tribunal be-
25 cause of its alleged insignificance. Does that comport with

your view of the evidence in the record?

2 A No, it does not.

3 Q Would you please explain?

4 A Information was presented into the record by our
5 industry witnesses, of course, demonstrating the effects of
6 regulatory restraint on an individual system. Showing how
7 significant it can be for any one particular system. We had
8 also presented into the record through my testimony our analysis
9 of the responses to the Copyright Royalty Tribunal survey which
10 showed that some 19 percent of the systems responding in that
11 survey who were regulated systems had received an amount less
12 than they had requested when they went in for a rate increase.

13 I believe it can affect a significant number of the
14 systems in terms of the amount. We had also included in the
15 record information on the regulatory lag which documented it,
16 can take on the average up to a year in order to secure a rate
17 increase so a system never knows when they will have that rate
18 increase.

19 Q There is some data on the record which shows that
20 between 1976-1980. The difference in rate increases naturally
21 implemented between regulated and unregulated systems was a
22 3 percent differential. Can you tell the Tribunal in your view
23 why, some reasons why this differential was not greater?

24 A As our industry witnesses testified, there is a real
25 problem in defining what regulated means. For many systems,

nlw-14 1 they feel joyous when rate increases are tied to a percent of
2 the CPI on a fixed basis. Examples were given. All rate in-
3 creases can go through without a formal request process as
4 long as they do not exceed 8 percent of the Consumer Price
5 Index. That system may call themselves deregulated when the
6 rate portion is very regulated.

7 There are a lot of problems with a definition of what
8 a regulated system is because of the close proximity of fran-
9 chises if any one franchise is deregulated, they may not be
10 able to raise their rates if the other franchises, which are
11 regulated, have much lower rates.

12 As a practical matter, they cannot exceed the prices
13 being charged in the areas that surround them. Those are two
14 of the main reasons.

15 COMMISSIONER JAMES: May I ask a question.

16 Generally, why would a cable system want to raise
17 their rates?

18 THE WITNESS: I would imagine increased cost.

19 COMMISSIONER JAMES: What would those increased
20 cost generally be?

21 THE WITNESS: I think the industry witnesses testi-
22 fied as to their top cost areas, depreciation, personnel, infla-
23 tion.

24 COMMISSIONER JAMES: What has caused that affect of
25 this increase in spending primarily?

THE WITNESS: I don't work for these companies.

COMMISSIONER JAMES: You are giving your opinion. I would like to know your opinion from the review of all the facts.

THE WITNESS: I would imagine inflation is one of the factors.

COMMISSIONER JAMES: One witness testified a lot of the costs had gone up. I used an illustration with Mr. Cooper. If wiring was costing \$10 at 100 yards and it went up to \$20 at 100 yards, that would be an increase in operating expenses presumably brought on by inflation.

THE WITNESS: In that example, maybe it is a new development in the wire.

COMMISSIONER JAMES: Let's say it is the same wire.

COMMISSIONER JAMES: Based on your experience and in your opinion, are the royalties paid now since the new act carried as a form of expense by cable system operators?

THE WITNESS: I do not know, but I would think it would be carried as an expense.

COMMISSIONER JAMES: If wire went up, if a lineman was getting \$15 an hour now and via inflation, he is getting \$20 an hour and this necessitates a cable operator going to a regulatory body to raise the rate and they were turned down, why should, in your opinion, the rates go up anyway for that lineman?

Why should not the copyright owner rates not go up?

nlw-16

1 Why should regulatory restraints have an affect in
2 your opinion?

3 THE WITNESS: Because the act specifically mentioned
4 it as something to consider and the fact it is totally beyond
5 their control.

6 COMMISSIONER JAMES: Say we consider and reject it,
7 what would be the problem?

8 THE WITNESS: If you consider and reject?

9 COMMISSIONER JAMES: Yes. It has no affect because
10 it is a part of the operating cost. They can't get it for a
11 lineman's salary going up, why should we consider it for holding
12 down the royalty payments in your opinion?

13 THE WITNESS: The cable industry is in a funny situa-
14 tion in that they invest an enormous amount of up-front capital
15 in their plant. It is not like your business where you can
16 close up shop where you cannot get a rate increase and you move
17 to another locality. You are pretty much stuck there. It seems
18 to me this is an area that had the foresight to realize regula-
19 tion is a real barrier for many systems.

20 This is one of the times it is being considered because
21 someone thought ahead and realized that was part of the problem.

22 COMMISSIONER JAMES: Let me ask you another question
23 along the same line. Most of the CSs pay a rate to the entity
24 granting the franchise; is that correct?

25 THE WITNESS: Yes.

1 COMMISSIONER JAMES: What is it predicated upon, gr ss
2 or net receipts?

3 THE WITNESS: I believe it is gross receipts.

4 COMMISSIONER JAMES: Thank you.

5 BY MR. FELDSTEIN:

6 Q The copyright holders have, again, repeatedly made the
7 point that regulatory restraint is terribly minor. They urge
8 upon this Tribunal a system-by-system approach. They have stated
9 that because the regulatory restraint problem is, in their
10 opinion, very minor across the entire industry. It should not
11 be considered. It is not per Mr. Cooper, but Mr. Attaway's
12 direction of Mr. Cooper that it should not be considered.

13 Assuming that if it was a relatively minor across the
14 industry, is it relatively minor to an individual cable system
15 who has not been able to get a rate increase?

16 A No. It can be major to a cable system. If his rates
17 are denied, he is totally affected. If you average that out over
18 the entire industry, it may be a small number, but to the indivi-
19 dual, it is 100 percent of his universe.

20 Q Thus, he would be hit with a surcharge because he did
21 not raise rates pursuant to inflation with no opportunity to have
22 that ameliorated by the restraint imposed upon many.

23 A That would appear to be correct. Yes.

24 MR. FELDSTEIN: No more questions.

25 COMMISSIONER COULTER: You count it as adding to

nlw-18 1 increase profitability of cable systems the increased purchase
2 into those systems by other investors?

3 THE WITNESS: That was one of the factors listed in
4 this report explaining why cable industry profits have gone up.

5 COMMISSIONER COULTER: They are counting equity as
6 annual profits?

7 THE WITNESS: Yes.

8 MR. FELDSTEIN: Would you read that?

9 THE WITNESS: Value per subscriber and operating
10 income.

11 MR. FELDSTEIN: The value per subscriber was the other
12 factor that the one you are asking about may influence.

13 COMMISSIONER COULTER: The value per subscriber.

14 MR. FELDSTEIN: How much is it worth to a buyer?

15 THE WITNESS: Right. They said both have gone up for
16 the cable industry. The value of each subscriber, if a system
17 is to be purchased or held and then the increase in profit. They
18 gave explanations for those two factors. They did not separate
19 them out.

20 COMMISSIONER COULTER: Value per subscriber to another
21 investor; is that it?

22 THE WITNESS: Or a purchaser of the system.

23 COMMISSIONER COULTER: How does the value of a sub-
24 scriber, anything other than the subscriber's fee?

25 THE WITNESS: This is a way of measuring the value of

1 the whole cable system as a business. In investment terms, it is
2 often referred to as value per subscriber. In fact, they give
3 some figures as to how valuable a subscriber is. I would imagine
4 they mention her 325 to 500 per subscriber.

5 I would think other factors would go into that in
6 addition to what they pay on a monthly charge like potential
7 expansion of the system. I cannot say what this investment house
8 was looking at.

9 COMMISSIONER COULTER: Could you say those two things,
10 again, that they were look at?

11 THE WITNESS: Yes. The sentence is these increases
12 in value per subscriber and operating income multiples reflect.
13 They gave the four factors.

14 COMMISSIONER COULTER: What, again, was the reason
15 that you brought that up?

16 THE WITNESS: The Copyright Owners referred to this
17 report saying that Mr. Valenti testified, in fact, the cable
18 system is enormously profitable. We wanted to explain, not on
19 the record the reasons the industry is enormously profitable are
20 essentially unrelated to programming. When they are related to
21 programming, it is pay television and other non-basic services.

22 COMMISSIONER COULTER: I was just interested in in-
23 creased buying into the system then is--

24 THE WITNESS: This is on an industry-wide basis. All
25 of this information, so it would be interested in cable systems.

nlw-20 1 in general as an investment potential.

2 COMMISSIONER COULTER: All that amounts to is increased
3 interest in cable is raising the price of the systems. That is
4 basically what that amounts to.

5 Thank you.

6 CHAIRMAN BURG: Mr. Attaway.

7 CROSS EXAMINATION

8 BY MR. ATTAWAY:

9 Q Ms. Beales, again, presenting questions in reverse
10 order to your rebuttal testimony, for the benefit of the Tri-
11 bunal, I would like to acknowledge the fact that you have just
12 been promoted to vice president of NCTA. I congratulate you.

13 A Thank you.

14 Q That is the nice thing I have to say.

15 On regulatory restraint, you said that assuming regu-
16 latory restraint was not a major factor industry-wide, it could
17 be a very major factor for individual systems; is that correct?

18 A I did not assume industry-wide but I did say it could
19 be very important for an individual system.

20 Q All right. Are you suggesting then that the Tribunal
21 should adopt some type of special relief procedure to here, the
22 cases of individual systems that might be particularly affected
23 by regulatory restraint?

24 A No, I am not.

25 Q You questioned the results drawn from the Copyright

1 Owners' drew from the CTY survey concerning the extent of regula-
2 tory restraint. You stated I believe that the CRT survey did
3 not measure in particular effect on unregulated franchises of
4 neighboring regulated franchises; is that correct?

5 A That is a factor that may not have been adequately
6 reported. Yes.

7 Q The only specific evidence that you introduced, in
8 your direct case, where you named cable systems so we can go
9 back and check was the 12 Times Mirror systems. Is it not true
10 that those 12 systems which Mr. Young stated categorically were
11 not regulated in any way, those rates are within 3 percent of
12 the subscriber rates for all of Times Mirror systems?

13 A That is correct. For that one company, that is how
14 it worked out.

15 CHAIRMAN BURG: Excuse me, Mr. Attaway. I asked
16 Mr. Cooper a question this morning with regard to that surcharge
17 on regulated stations. I said, given the fact that there might
18 be some and he said there were very few. It strikes me not in
19 your testimony but in the testimony of one of your industry
20 people, one of your cable operators, the figure of 88 systems,
21 the figure 88 was used with respect to the number of systems
22 being regulated as of this April 1, 1980.

23 Again, we get into the semantics of what the 88 systems
24 could comprise, a greater number of franchises?

25 THE WITNESS. Systems could. I believe our industry

nlw-22

1 witnesses were all speaking or had planned, at least, to all
2 speak on franchise levels. That is what, in their jobs as
3 operations directors, they go to the individual franchise to ask
4 for the rate increase. So, all of their data, as we collected,
5 it was down on a franchise basis because that is how they operate.

6 CHAIRMAN BURG: Then 88 franchises is one thing.
7 Eighty-eight systems is entirely different.

8 THE WITNESS: It could be. There are some cable
9 systems that operate in one franchise area. Like everything
10 else in the cable industry, it varies greatly.

11 CHAIRMAN BURG: For my own information, I will check
12 back in those transcripts. Thank you for allowing me to inter-
13 rupt you.

14 MR. ATTAWAY: I was looking for the exact reference
15 to the 88 systems in the transcript and I can't find it.

16 CHAIRMAN BURG: I think it was the same day they
17 were introducing evidence in terms of how many systems franchises
18 requested increases and the number that were allowed by what
19 dollar amount. They were allowed and the number that were turned
20 down and denied. All of that happened at about the same time.
21 I will find it at some point. Thank you.

22 BY MR. ATTAWAY:

23 Q On the CRT survey, I believe you stated that of the
24 regulated systems, 19 percent failed to achieve the rate increase
25 that they requested; is that correct?

1 A That is correct. That was on the exhibit we had
2 presented.

3 Q My recollection is that that 19 percent included sys-
4 tems whose rate increase was pending but had not been denied.

5 A That is correct. As I stated in the original testi-
6 mony, there were several pending for several years included in
7 that. That is why we decided to include them in the percent not
8 granted. To wait for two or three years for a rate increase
9 seemed to me to be getting an amount less than requested.

10 I believe in the record we also included all the
11 other numbers associated with that.

12 Q Of those pending rate increases, how many had been
13 pending for years?

14 A Two had been pending since September of '78, one from
15 January of 1978, one from November of '79, one from December of
16 '79, two from November of '78 and two from February of '80.

17 Q That is the total pending?

18 A Yes. That I am not sure. I just have it written
19 on my note here. I think that is the total. I did not bring
20 the worksheet with me. So, I believe that is correct.

21 Q Of that 19 percent of the cable systems that did not
22 either have their rate increased, denied or their rate increase
23 request was still pending, of those that did achieve some rate
24 increase, although not what they requested, what percent of what
25 they requested did they receive?

nlw-24

1 A The chart and this was Exhibit No. 10, NCTA, showed
2 the amount requested was 96 cents on the average for the 350
3 systems responding to the CRT survey and the amount granted
4 was 88 cents on the average, an amount of increase.

5 Q What percent is 88 of 96?

6 A I believe it to be 92 percent.

7 Q Your reference to the Warburg Paribus Report, am I
8 correct in understanding that that reference was made to
9 establish that distant signals are not important, an important
10 factor relevant to the profitability of cable systems?

11 A They are not a factor listed in this report for the
12 increase in profits.

13 Q Are they an important factor?

14 A They are a factor.

15 Q Did your witness, Mr. Young, not confirm distant
16 signals as an important factor in achieving a rate increase at
17 least on one of his systems that he talked about. I am refer-
18 ring to Long Beach, California.

19 I believe on page 26 of the October 26th transcript,
20 he talks about channel 17. I think, referring to WTBS, out of
21 Atlanta, that is one of the reasons that his Long Beach system
22 had been able to achieve some considerable lift. I think he
23 meant subscriber interest.

24 A In that case, yes. I was important in that instance.

25 Q Going to your exhibit, please, R-3, as I recall,

1 counsel, summed up your testimony with respect to this exhibit
2 by saying that it shows that the statement of account methodol-
3 ogy produces the same results as the Factbook methodology; is
4 that correct?

5 A That happens to be one of the results here. Yes.

6 Q I don't think it is. I would like to examine this
7 a little more carefully under the column 1976. Were not both
8 the numerator and the denominator, as far as we know, derived
9 from the Factbook?

10 MR. FELDSTEIN: Objection. The witness has been
11 repeatedly asked on direct questioning about where these 1976
12 figures came from. She stated that she did not know. I offered
13 to present a witness which I will do after Ms. Beales.

14 You may ask questions where the 1976 figures came
15 from from that witness. This witness is not qualified to
16 answer those questions.

17 CHAIRMAN BURG: Sustained.

18 BY MR. ATTAWAY:

19 Q Let's turn to the 1980. The division of \$1.08 was
20 obtained by dividing the 1979-2 statement of account informa-
21 tion by the statement of account information on royalties paid;
22 right?

23 A The royalties were divided by subscribers.

24 Q That's what you refer to as the statement of account
25 methodology?

nlw-26

1 A That is correct.

2 Q Below the second listing refers to 1979 royalties
3 share 1980 Factbook. Is this the Factbook methodology?

4 A This is not a Factbook methodology but my methodol-
5 ogy utilizing the royalties paid to the Copyright Office and
6 the information contained in the 1980 Factbook for subscribers
7 in the cable industry as of January 1, 1979.

8 That is exactly my point. The only thing in this quota-
9 tion relating to the Factbook is the subscriber counts, right?

10 A That is correct.

11 Q How do you reach the conclusion that this exhibit
12 shows that the statement of account methodology is the same
13 as the Factbook methodology?

14 A It is not the same.

15 Q The same results.

16 A The Factbook methodology is the same used the
17 produce the 10.8 million subscribers in '76. That is why we
18 used it. The Factbook counts the same way presumably their
19 10.8 figure as accurate as the 14.1 million figure. This is
20 a check on the method we utilized in the statement of account
21 forms which is the method recommended because we think it is
22 the most accurate. The results are very similar.

23 Q Are you saying the 1976 figure is a result of the
24 Factbook methodology?

25 A I am saying the number of subscribers, the 10.8

1 million subscribers appears in the 1976 or all of the Fact-
2 books on the chart as the official figure for January 1, 1976.
3 So, the subscribers figures both come from the Factbook.
4 Presumably, they use the same methodology in deriving at the
5 subscriber number.

6 Q Where does the 8.7 come in?

7 MR. FELDSTEIN: Objection. It is the 8.7 that will
8 be testified to by the next witness.

9 BY MR. ATTAWAY:

10 Q I don't know how you are going to do this without
11 answering that question, but please tell me, since what you
12 have labelled the Factbook methodology, you have a figure under
13 1980, which you actually got from the statements of account,
14 how does this exhibit compare statements of account methodol-
15 ogy, the results of statements of account methodology, with
16 the results of Factbook methodology?

17 I don't think it does.

18 A This exhibit provides an independent check using
19 a different source for subscriber data which corresponds to
20 the 1976 subscriber data to check the statement of account
21 forms. It shows the results come up very close to the state-
22 ment of account forms as we analyzed about 4,000 account forms
23 for subscribers and royalty payments listing.

24 Q Am I correct that what this exhibit actually shows
25 is that the 1980 Factbook listed about the same number of

nlw-28

1 subscribers as the 1979-2 statements of account.

2 A 13.9 is what we found on the statement of account,
3 14.1 million subscribers from the Factbook.

4 Q That is really all this chart shows, right?

5 A Yes. The chart also shows the increase over the
6 period of time, of course, and shows, well, that's the main
7 thing, the increase over the period of time.

8 COMMISSIONER JAMES: As compared to 1976.

9 THE WITNESS: Right.

10 COMMISSIONER JAMES: I asked you and when you testi-
11 fied before, if the facts Congress dealt with were wrong,
12 everything you have predicated is also wrong.

13 THE WITNESS: That is correct. I believe the next
14 witness will be able to clarify this for you.

15 BY MR. ATTAWAY:

16 Q How many statements of account are reflected in
17 your first 1980 equation?

18 A 3,756.

19 Q You did the universe?

20 A Yes.

21 Q In the 1980 Factbook, where did you obtain the
22 14.1 million subscribers?

23 A I believe it came from page 477A.

24 Q It would seem that the Factbook for every year dif-
25 fers several numbers with different dates.

1 A Right, January 1, 1979,

2 Q January 1, 1979,

3 A That is correct,

4 Q So, that was the number of subscribers at the
5 beginning of the year?

6 A That is correct,

7 Q The 13,9 would have been the number of subscribers
8 at the end of the year,

9 A Reported on the 3,700 forms that we analyzed, Of
10 course, we didn't quote the entire universe, We omitted
11 some forms, So, those are taken out of the total,

12 Q They write down the number of subscribers that they
13 have at the end of the accounting period,

14 A Yes,

15 Q December 31, 1979,

16 A Yes,

17 Q So, what we have here is one number for January 1,
18 1979 and another number for December 31, 1979?

19 A That is correct,

20 Q Turning to--

21 COMMISSIONER JAMES: With one exception on the last
22 question, there are about 400 systems that you did not include.
23 The Factbook would have included those 400,

24 THE WITNESS: That is correct,

25 COMMISSIONER JAMES: That might cause the differential.

nlw-30

1 THE WITNESS: I believe that to be accounting for
2 the difference.

3 BY MR. ATTAWAY:

4 Q On chart 3-A exhibit, under the column headed,
5 1979 Estimates, what do the letters "LH" mean?

6 A Legislative History.

7 Q What you have done here is merely substitute for
8 the 10.8 million subscribers listed in the legislative history.
9 The 11.6 million subscriber reported in 1977 television Fact-
10 book as of October, 1976?

11 A That is correct.

12 Q You did nothing with the numerator of that equation?

13 A That is correct.

14 Q Tell me what this purports to show.

15 A This shows subscribers estimated as of October 1,
16 1976. The 10.8 million figure is as of January 1, 1976. It
17 has suggested that it might be more accurate to use a later
18 figure that more closely corresponds with the date of enact-
19 ment. Hence, we estimated the October 1, 1976, subscriber
20 figure.

21 Q But without also changing the numerator, I don't
22 understand what this proves, if anything.

23 A It is my understanding that the 8.7 million was the
24 amount to be collected for the entire year.

25 Q Are you suggesting Congress had in mind to collect

1 a specific amount of royalties and, therefore, you would not
2 change your numerator?

3 MR. FELDSTEIN: The next witness will testify on
4 that question.

5 COMMISSIONER JAMES: I think that is probably all
6 the exhibits include. That is an opinion based on her back-
7 ground.

8 MR. ATTAWAY: Commissioner James, I know--

9 COMMISSIONER JAMES: I have the same problem.

10 MR. ATTAWAY: The next witness that I believe NCTA
11 is going to produce was there at the time. I will agree to
12 reserve my questions if you agree to that.

13 COMMISSIONER BRENNAN: Maybe the Chairman can get
14 Congressman Kastenmeier to appear as the next witness.

15 COMMISSIONER GARCIA: Excuse me. On 3-A.

16 COMMISSIONER COULTER: I am puzzled about the pro-
17 fitability. Are you saying that the rise in the price of a
18 given system has been a factor of increasing cables profit-
19 ability? Is that the thrust of what you are saying?

20 THE WITNESS: This report¹¹, Warburg Paribus and
21 Becker, was prepared for investigators. It is an investment
22 company. In analyzing, I can't tell you what they were think-
23 ing. I can only tell you what they have reported here.

24 COMMISSIONER COULTER: Is your understanding that
25 what they have reported?

nlw-32

1 THE WITNESS: Yes. What I read is what they reported.
2 They did say, in a prior sentence, that they were talking in
3 part about the historical sale value of a cable system, how
4 that is reflected in a per subscriber value, a monetary value.

5 COMMISSIONER COULTER: I don't see how that trans-
6 lates itself into profitability on an annual basis unless people
7 are counting some of their equity as profits?

8 THE WITNESS: That I cannot testify as to how they
9 computed this. I read you the four reasons they had. Some
10 were programming oriented and some were counted as increased
11 interest in cable as an investment. Those were the reasons
12 they listed for increased value per subscriber and operating
13 income multiples.

14 COMMISSIONER COULTER: I can see that, but the
15 question is whether that really relates to the profitability
16 that Mr. Valenti was alluding to.

17 THE WITNESS: He used this source as talking about
18 the cable industry being profitable.

19 COMMISSIONER COULTER: I am aware of that. The
20 question is whether the program reasons that cable is profit-
21 able may outweigh all those other reasons?

22 THE WITNESS: That is entirely possible. The pro-
23 gramming, the pay cable might outweigh the other reasons. I
24 have no idea how this could weigh. Their conclusion was the
25 industry was profitable which Mr. Valenti cited. I wanted you

1 to have their reasons why they thought the industry was pro-
2 fitable.

3 COMMISSIONER COULTER: Just as a hypothetical, if
4 there was a decision to increase the rate somewhat to handle
5 the problem of inflation, would you want this to be done on a
6 system-by-system basis or would you rather avoid the inconvenience
7 of that and have an increase across the board except the in-
8 equities involved with that against the inconvenience of a
9 system-by-system.

10 THE WITNESS: I believe with the current method, as
11 stipulated by Congress, it is very acceptable to the cable
12 industry, doing it on an industry-wide average has been widely
13 accepted and would be better than the system-by-system approach.

14 COMMISSIONER COULTER: You would rather do that
15 in spite of the inequities?

16 THE WITNESS: Yes. That is the system we have been
17 operating under and it has not produced a problem with that
18 respect.

19 CHAIRMAN BURG: Mr. Feldstein.

20 REDIRECT EXAMINATION

21 BY MR. FELDSTEIN:

22 Q Turning to R-3 where Mr. Attaway pointed out the
23 number of subscribers in your 1980-2 methodology you came up
24 with 13.9 at the end of the year and 14.1 for the beginning
25 of the year. The implication was this is a strange scene.

nlw-34

1 Commissioner James put his finger on one of the reasons which
2 is the subscribers represented by the 400 systems which were
3 not included in your 13.9 million subscriber count. How did
4 you count subscribers on the statement of accounts?

5 Did you not use the first set subscribers?

6 A That is correct. That was explained in my direct
7 testimony. We relied on the first set subscribers.

8 Q Does not the Factbook use equivalent subscribers
9 by adding in other subscribers?

10 A That is correct.

11 Q Is that not a second explanation?

12 A Yes.

13 COMMISSIONER GARCIA: The fact there is a year
14 between them.

15 MR. FELDSTEIN: It would run the other way. Logic
16 would tell you the number on top, 13.9, ought to be larger
17 than the 14.1, but as Commissioner James points out, there are
18 several systems not recognized and these two sources count
19 subscribers differently. Both raise the top number to a point
20 where it would be higher than the number on the bottom.

21 THE WITNESS: To further explain that, the royalty
22 fees from the statement of account are only for those systems
23 where there are subscribers reported. For or when we utilize
24 the Factbook subscriber figure which includes an additional
25 set, we use total royalties which are on industry gross

Accurate Reporting Co., Inc.

(202) 726-3801

1 receipts from those same areas, so they correspond.

2 BY MR. FELDSTEIN:

3 Q Questions have been raised, again, about the possi-
4 bility of an industry surcharge being inequitable on individual
5 systems. Under the statutory scheme, a CATV system with the
6 same number of subscribers and the same number of DESS, but a
7 different subscriber rate would pay different copyright than
8 another one so situated?

9 A That is correct.

10 Q Thus, the statutory scheme which is on an industry-
11 wide basis builds in a differential in these circumstances?

12 A That is correct.

13 Q Thus, an industry-wide adjustment would simply
14 track the statute then?

15 A That is correct.

16 Q I have one more question. It has been pointed out
17 a couple of the form 2s from 1979 looked funny, too few sub-
18 scribers, too much copyright. When you did the average of
19 averages of all of the forms for Commissioner James, you would
20 have discovered that; is that correct?

21 A Yes. That method, it is much easier to spot vari-
22 ances.

23 Q You threw some out which were very different.

24 A Right. Very few but there were some that were dis-
25 carded.

nlw-36

1 Q Thus, the methodology which Commissioner James
2 requested us to do was away of policing and casting out the
3 wildly disparate forms.

4 A Yes. When you come up with a royalty fee per sub-
5 scriber for each individual system and you know that the
6 average is, say, 48 cents, you come across one that is \$17,
7 it is fairly easy to spot if there was a problem with the form.
8 It makes it easier to check under that methodology.

9 Q Thus, in some ways, that might be a more accurate
10 methodology?

11 A It might.

12 MR. FELDSTEIN: Thank you, Ms. Beales, and congratu-
13 lations.

14 [Whereupon, NCTA Exhibits 3, 3A,
15 and 4 were marked for identifi-
16 cation and received in evidence.]

17 [A short recess was taken.]

18 - - -
19
20
21
22
23
24
25

1 CHAIRMAN BURG: Back on the record.

2 Whereupon,

3 KATHRYN CREECH

4 was called as a witness and, having been first duly sworn,

5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. FELDSTEIN:

8 Q Mr. Creech, would you state for the record your
9 name and your position and place of employment?

10 A Yes. I am Kathryn Creech, Senior Vice President
11 with the National Cable Television Association. I have been
12 with the National Cable Television Association since 1972.
13 I have been employed there in various positions, including
14 Research Director and Vice President of Research.

15 Q Can you tell us your education?

16 A Yes. I have a B.A. from the University of
17 Virginia and the M.B.A. from George Mason University.

18 Q Can you tell us what your position was at NCTA
19 during the period in question in 1976 up to the passage of
20 the Copyright Act?

21 A In 1976, I was Director of Research for the
22 National Cable Television Association and in '77 I became
23 Vice President of Research and was responsible for all the
24 computations in the copyright negotiations.

25 Q Thank you. The copyright holders, through

lw-2

1 Mr. Valenti, testified that DSs are "overwhelmingly" and
2 "crucially" important to CATV systems. He cited the Hart
3 Study as a substantiation for his testimony. Are you familiar
4 with the Hart Study?

5 A I am.

6 Q NCTA Exhibit Rebuttal Five is a copy of the
7 Hart Study. Will you please describe the study and the
8 results?

9 A Yes. In the spring of 1979, the National
10 Cable Television Association commissioned Peter Hart and Asso-
11 ciates to do a study for us, a nationwide survey of attitudes
12 toward cable television. I was the Vice President of Research
13 at that time.

14 I conducted all the lesson work with Peter Hart
15 and Associates and directed the survey. The survey was done in
16 15 cities across the country, distributed geographically and
17 in size ranks. They are mostly major markets. They are
18 mostly markets without cable television.

19 In all cases, the respondents to our survey were
20 non-cable subscribers, people who did not have access to
21 cable television. So, this is truly a study of perception
22 or attitude toward cable rather than one based on direct
23 experience with cable television.

24 Mr. Valenti's point that DSs are critical to
25 cable development is not borne out by the Hart Study. The

1 Hart Study finds that there are various services which are
2 critical to cable subscribers-- most important, the diversity
3 of programming which cable offers.

4 DSs are a part of that program diversity, but
5 not the entire program diversity. I would like to direct
6 your attention to a few critical sections which might help
7 substantiate the real role of DSs in the minds of the public.

8 I think first page five, there were about
9 100 people participating in each major market. They were
10 asked the major advantage that they would see in cable
11 television service. They volunteered many ideas about
12 what cable would offer. Mostly, they volunteered ideas
13 related to increased choice. This is on the last paragraph
14 of page five. Most of the advantages related to increased
15 choice. 43 percent say there would be more choice, channels,
16 shows or variety. 47 percent mentioned different types of
17 programs.

18 Now, the critical line. More movies was mentioned
19 by 13 percent. First run movies or HBO, nine percent.
20 Sports, eight percent; programs from other cities or areas,
21 five percent. So, while obviously DSs as reflected both
22 in sports programming and programming for other cities are
23 critical they are not the major or only factor in cable
24 television.

25 The other point I would like to direct your attention

lw-4

1 to is on the next page, page six.

2 COMMISSIONER JAMES: Just a minute. Would you
3 read back your conclusion? What conclusions would you
4 draw?

5 THE WITNESS: While obviously DSs, as reflected
6 in two categories, programs from other cities and the
7 sports programming, which are often programs from other
8 cities, are important in the cable mix, they are not the
9 only factor in the cable mix nor necessarily the most important
10 factor.

11 CHAIRMAN BURG: Couldn't first run movies be
12 imported?

13 THE WITNESS: No. First run movies would be on
14 pay..

15 CHAIRMAN BURG: What is the difference between
16 first run movies and HBO?

17 THE WITNESS: The same thing. Many people do
18 not know the word "HBO". Some heard it in the newspaper
19 or on the radio. Others referred to uninterrupted, generically.
20 Obvious liberty has to be taken when you have an open-ended
21 question like that.

22 CHAIRMAN BURG: What about the 13 percent?
23 Could some of those be on DS?

24 THE WITNESS: Yes. We believe from speaking to
25 people who conducted the survey the majority of these movies

1 were special channels of pay movie programming, not broadcast
2 programming.

3 CHAIRMAN BURG: Why is there a differential,
4 13 percent and nine percent if the person who is being
5 interviewed thinks they are the same?

6 THE WITNESS: It is very difficult in doing a
7 survey of people who don't know the terms of art in the
8 industry. This is our best effort of distinguishing the
9 various responses.

10 CHAIRMAN BURG: I could draw a difference and
11 anybody else could.

12 THE WITNESS: Statistics never lie.

13 COMMISSIONER COULTER: I would like to pursue
14 that. On the 43 percent who said there would be more choice,
15 that 43 percent, those different choices meant by that 43
16 percent don't exclude imported signals; do they?

17 THE WITNESS: No, sir. You could pick more than
18 one thing as being important to you, an advantage to you.
19 So, there were multiple responses to that questions.

20 CHAIRMAN BURG: Ms. Creech, could the designation
21 more movies 13 percent come from independent broadcasting
22 stations?

23 THE WITNESS: Yes. That was Mr. James' question
24 as well. We believe that does not.

25 COMMISSIONER JAMES: Nothing in the surveys

1 indicate?

2 THE WITNESS: No. My statement is based on
3 conversations of individual people who took the questions
4 in the cities. Perhaps if I could through the others, it
5 might provide more insight. On page six, the survey person
6 tried to ascertain from the people questioned which services
7 had the widest appeal among several services listed. They
8 went through a list of services and asked respondents to
9 rate the value they placed on those services.

10 The table at the bottom of the page six lists every
11 service that the questionnaire gave to the survey respondents,
12 the percentage or the number of people who rated those services
13 as important. The first item is having a channel providing
14 first run movie and concerts. 75 percent of the respondents
15 felt that was important. Improving reception for area local
16 stations; 63 percent felt that would be important. It goes
17 on.

18 Professional and college sports and events from
19 other major cities. That could well be DS. It could also be
20 pay. That is 54 percent. Children's programming, 52 percent.
21 Local programming, 52 percent. Additional commercial channels,
22 44 percent.

23 So, again, while all of the services that cable
24 offers are important in the program mix, we cannot draw from
25 this data the conclusion Mr. Valenti reached, which was that

1 DSs were the most critical factor. They are one of several
2 factors.

3 COMMISSIONER JAMES: Dealing with the first one
4 which got the highest, is there a reason to exclude DS from
5 that?

6 A First run movies, when people give that response,
7 we believe that is pay cable. Concerts, Las Vegas entertain-
8 ment events, cultural events and first run movies are what
9 the average person who is not a cable subscriber refers to
10 as a pay service.

11 MR. FELDSTEIN: Repeating again, did you not
12 say first run movies would not be on DSs?

13 THE WITNESS: Exactly.

14 COMMISSIONER JAMES: Never?

15 THE WITNESS: To my knowledge, sir.

16 The one other point I would like to share with you
17 is on page eight. Again, the question attempt- to ascertain
18 the value of different kinds of cable services to the
19 consumer.

20 At the bottom of page eight, you see four kinds
21 of services outlined or four things that cable can offer:
22 better reception, DSs, local programming and a special
23 entertainment channel with no commercials. That is pay TV.
24 On page nine, you see a chart with the respondents who were
25 asked to indicate their interest for cable service with all

1 four of these features.

2 As you can see, 44 percent of the respondents
3 had high interest in cable with what we might call full
4 service package. When the feature of commercial channels
5 from other cities is removed out of that package so you
6 only have three of the full services, the number of people who
7 are very interested in cable drops as shown on the top of
8 page 10. That drops to 33 percent. High interest in cable
9 without commercial channels from other cities.

10 The next questions was what happens if we remove
11 the pay cable channel. We have your local programming. We
12 have better reception. We have DSs, but we remove pay.
13 What level of interest then? At that point, only 19 percent
14 had high interest in cable television. So, you can see once
15 again that pay and DSs and all the services offered by cable
16 are a critical part of the cable package.

17 MR. FELDSTEIN: Excuse me. Is that on page 11?

18 THE WITNESS: Yes. The small chart at the
19 top. I'm sorry. Again, the Hart Study does not substantiate
20 Mr. Valenti's claim that DSs are the critical--only or most
21 important factor in cable growth.

22 BY MR. FELDSTEIN:

23 Q Mr. Valenti testified they are overwhelmingly
24 important. Are you stating the Hart Study refutes that
25 contention?

1 A Right. There is nothing in the Hart Study
2 which supports that contention.

3 MR. ATTAWAY: May I ask for a citation to
4 Mr. Valenti's purported statement?

5 CHAIRMAN BURG: Indeed.

6 MR. FELDSTEIN: Monday, September 29th transcript,
7 page 13. Mr. Valenti says: "The NCTA themselves commissioned
8 a report, the Hart Report, which they submitted to the FCC,
9 which concludes that carriage of DSs was overwhelmingly
10 important, crucially important to cable operators."

11 COMMISSIONER COULTER: May I ask a question?
12 Do you think any significance should be attached to the
13 fact that a drop when you remove signals from other cities,
14 a drop is from 44 to 33 and when you remove the special
15 entertainment channel, it goes down to 19? In other words,
16 the drop is greater proportionately.

17 THE WITNESS: The significance which might be
18 attached to it is in the eyes of these respondents. They
19 were more interested in the pay cable service than they were
20 in the DS service. That is the way these people responded
21 to the questions.

22 COMMISSIONER JAMES: Has your organization
23 conducted any survey of a similar nature of people who actually
24 have cable?

25 THE WITNESS: Yes. We conducted surveys in

1 connection with the FCC economic inquiry, which I believe
2 Mr. Feldstein submitted at the beginning of these rebuttal
3 hearings. The FCC has also done extensive work in this area
4 which I will refer to later on if you would like.

5 BY MR. FELDSTEIN:

6 Q Does the Hart Study involve people who were
7 not cable television subscribers?

8 A That is correct.

9 Q Mr. Collins at ATC testified with regard to
10 what happens in real system situations. He told how the
11 advent of pay cable in other non-broadcast services raised the
12 subscriber penetration level in systems with a flat existing
13 penetration. Furthermore, it makes cable television feasible
14 in the bigger cities, where the carriage of broadcast signals
15 alone would not allow a cable television system to be built.

16 From your position in the industry, in your
17 years of experience, is this consistent with your knowledge
18 of the industry?

19 A Mr. Feldstein, it is consistent. And I
20 mentioned earlier, I have been in the industry for some time.
21 I have been involved in tracking the progress of the industry
22 over those years. Prior to 1977-76, which are generally
23 the years marking the advent of pay television and the advent
24 of satellite delivery of pay television, the major markets
25 in this country were not being built for cable. They were not

1 being constructed. I think, I believe that the reason that
2 major markets were not being constructed was because they
3 were well served by broadcast stations already. They were
4 characterized by excellent broadcast service.

5 A cable system simply coming in and offering
6 more broadcast service was not adequate to cover the tremen-
7 dous cost of building such a market.

8 So, cable operators were forced to try to find
9 something more to offer. Hence, the advent of pay television.
10 The FCC has done research in their economic inquiry which
11 I mentioned earlier, which has been submitted. They were
12 trying to determine what the demand for cable television
13 services are.

14 Let me read a couple of sentences from paragraph
15 eight of Docket 21284, FCC Docket. The FCC says the demand
16 for cable television service, i.e. the retransmission of
17 broadcast signals is commonly measured by the penetration rate.
18 The number of households that subscribers to cable service
19 as a fraction of those offered services. They go on to
20 say that the demand for cable is strongest in smaller markets
21 with few signals available over the air and at the fringes
22 of larger markets where signal quality reception decline.

23 At paragraph 92 in some the demand for cable
24 television varies according to local conditions. Generally,
25 these studies agree in predicting relatively low penetration
rates not in excess of 40 percent for large urban areas with

lw-12

1 good over the air service.

2 So, the FCC's research has supported what we
3 in the industry have observed for some time. Cable operators
4 serving major markets must provide services in addition to
5 broadcast signals because of the declining value of those
6 signals in markets already well served.

7 Q Thank you.

8 MR. FELDSTEIN: Did that answer the question that
9 you had, Commissioner James?

10 COMMISSIONER JAMES: No. I have other questions.
11 I will let you finish.

12 MR. FELDSTEIN: I was trying to get her to answer
13 the question about what people in these cities actually do
14 find of value.

15 THE WITNESS: Let me address that.

16 The growth of cable in these major market cities
17 have occurred over the last 18 months. The instrument necessary
18 track the growth has not been available. A cable let in
19 Dallas would not be built and have subscribers in place to
20 ascertain the information you would like to have, i.e., what
21 signal or program is more valuable until those people are
22 actually receiving cable service.

23 We have a lag in being able to deliver the kind
24 of information you want. Those major markets are just now,
25 or for the last two years, are being build. That is why I

1 don't have information to present to you today demonstrating
2 all the viewing habits that are experienced in market cable
3 systems.

4 COMMISSIONER JAMES: You do have information of
5 the ones in existence back in '68 and '72.

6 THE WITNESS: And the FCC, whose job was to
7 project future impact of its regulatory actions was trying to
8 ascertain what would happen in terms of DS in major markets.
9 These are conclusions I just read, which the FCC reached
10 regarding the future.

11 COMMISSIONER JAMES: On expansion of television,
12 cable into the major market?

13 THE WITNESS: Yes.

14 COMMISSIONER JAMES: My question is what the
15 people who had television for 10 or 15 years and what are
16 the stations they are more frequently watching.

17 THE WITNESS: Cable television subscribers?

18 COMMISSIONER JAMES: Yes.

19 THE WITNESS: Looking at the market across the
20 country, we have found that DSs are very important. They
21 range in importance from very important and probably critical
22 to the system to a part of the service, as the Hart Study
23 shows. Many factors determine the value.

24 For example, if you don't have an independent
25 station in the market receiving an independent station, no

1w-14

1 matter what the quality, is a benefit. It is something more.
2 If you have two already, you want something particularly
3 interesting to you.

4 Another factor which has determined the value
5 of distant signals is the proximity or the geographic
6 closeness of the market. For example, the Chicago independent
7 stations are very popular and very heavily watched by cable
8 subscribers in middle America. That is the nearby major
9 market for sporting events and that kind of thing. They would
10 not nearly be as popular in Atlanta. WTTS, the superstation
11 which the Atlanta Braves are carried on is carried all over
12 the country, no recording viewing.

13 In other areas, particularly in the south, it
14 is important to cable subscribers and they watch it extensively.
15 As Ms. Beales pointed out several times, it is hard to
16 generalize about the industry. The value of DS varies
17 from market to market and is based on a semi-equation of
18 what they offer in relation to what is already in the market.

19 BY MR. FELDSTEIN:

20 Q Ms. Creech, to the long awaited area of inquiry,
21 the 8.7 million which has been used on numerous occasions
22 during this hearing and many questions have arisen as to the
23 origin of this mysterious number. The House Report on the
24 1976 Copyright Law, as we have seen, states that the fee
25 schedule adopted was predicted or estimated or approximated

lw-15

1 to achieve \$8.7 million in royalties in 1976 if CATV
2 systems were paying copyright during that year.

3 It goes on to state that "based on projections
4 supplied by the interested parties--" do you know who the
5 interested parties were?

6 A The interested parties were NCTA and MPAA.

7 Q Who was responsible--

8 COMMISSIONER BRENNAN: Pardon me. Not NAB.

9 THE WITNESS: They were not involved in the
10 computation of copyright fees.

11 BY MR. FELDSTEIN:

12 Q Who was responsible for NCTA's work, and it
13 doesn't say all interested parties, but interested parties.

14 (General laughter.)

15 Who was responsible for NCTA's work on this
16 project?

17 A I was responsible in copyrighting.

18 Q Who was your counterpart at MPAA?

19 A Mr. Attaway.

20 Q Please tell the Tribunal where the \$8.7 million
21 figure came from?

22 A The \$8.7 million was the amount which the Senate
23 Bill S 22, which was based on a straight percentage of
24 revenue fee schedule was calculated to deliver to copyright
25 holders.

lw-16

1 CHAIRMAN BURG: You are not telling us that, that
2 was provided by Mr. Brennan; are you?

3 MR. FELDSTEIN: Let the record be silent.

4 COMMISSIONER JAMES: If it is, he kept it a
5 secret from all of us.

6 (General laughter.)

7 MR. FELDSTEIN: I would like to introduce NCTA
8 Exhibit R-7 and R-8.

9 (NCTA's Exhibit Nos. R-7 and R-8 were marked
10 for identification and received into evidence.)

11 BY MR. FELDSTEIN:

12 Q You testified that the \$8.7 million was the
13 figure calculated which would have been achieved under the
14 Senate version of the Copyright Bill?

15 A That is correct.

16 Q Referring to Exhibit R-7, you will notice on
17 the first page that a royalty fee and agreed upon--let me
18 identify this document.

19 Can you tell us what this document is?

20 A The document referred to the agreement reached
21 between NCTA, the National Cable Television Association
22 and MPAA, the Motion Picture Association on the terms of
23 the Copyright Bill in the House of Representatives. It includes
24 the fee schedule in that.

25 Q Knowing the fee schedule on the first page of
the document, how is this fee schedule arrived at?

1 A The fee schedule included in that docunet is the
2 result of extensive survey sample and analytical work done
3 by myself on behalf of the National Cable Television
4 Association and Mr. Attaway.

5 The objective throughout all of the research
6 and attempt to structure a fee schedule was to accomplish,
7 to reach this \$8.7 million. It is important to understand
8 that we did not start out manipulating a fee schedule with
9 no idea what was to be accomplished by that fee schedule.
10 We had a very firm objective to develop a fee schedule,
11 which would drive to the copyright holders \$8.7 million,
12 were that fee schedule in effect in 1976.

13 The cable industries -- payments for 1976 were
14 to be \$8.7 million.

15 Q I want to stress this. You are stating that
16 the fee schedule was not adopted first and then a prediction
17 of how much it was raised.

18 A Right.

19 Q You had a target of \$8.7 million agreed upon
20 between the parties?

21 A Yes.

22 Q You attempted to find data so you could set a
23 fee schedule which would reach that 8.7?

24 A That is correct.

25 Q What type of data did you use to achieve this

1 result?

2 A Let me explain the methodology in full and
3 go through it very slowly and attempt to answer the questions
4 raised throughout this proceeding. We began to work in
5 developing a fee schedule in winter and spring of 1976. We
6 used the Television Fact Book to pull a sample of cable
7 television systems using a random number listing. We numbered
8 all the systems in the Television Fact Book and pulled a very
9 random sample of cable television systems from that 1976 Tele-
10 vision Fact Book, as many witnesses have pointed out.

11 The 1976 Television Fact Book generally reflects
12 subscriber information from 1975. The Television Fact Book
13 Company surveys all the cable systems in the spring of 1975.
14 They compile the data. It goes to the printer-publisher
15 around the end of the year and is available at the beginning
16 of the year 1976.

17 Once we drew our sample and computed the
18 revenues for all the cable systems multiplying subscribers
19 bimonthly rate by a 12-month period to get annual subscribers,
20 we classified these into various revenue categories that we
21 felt would be applicable for the bill and generally keeping
22 the revenue categories which were outlined in S.22 and now
23 are included in this current bill.

24 The first effort when you draw a sample is
25 to check whether the sample fits the industry which you are

lw-19

1 sampling. So, we checked out many cable systems were in
2 each revenue category in the sample compared to the industry.
3 We found the fit was pretty good. We were very aware at that
4 time we were using 1975 data to develop 1976 numbers. We
5 were concerned about that. We initially applied a 12 percent
6 inflator factor to the system revenue and subscriber numbers
7 actually to the total gross receipts.

8 The total gross receipts which based on '75 numbers
9 had a 12 percent inflator added to them to cover growth
10 during the period. As we progressed with our work in the
11 sample and attempted to clean it up as much as possible and
12 make it as accurate as possible, we hired a statistician who
13 came in and advised us on procedures to take. I believe
14 MPAA do likewise.

15 The statistician suggested that we should increase
16 our sample to be sure we included more of the DSE or larger
17 revenue systems. In the industry, there are very few of these
18 larger revenue systems proportionate to the industry. But,
19 as Mr. Cooper pointed out I believe, they represent about
20 90 percent of the copyright payments. So, it is critical
21 that these systems are measured correctly.

22 So, we added to our sample with particular
23 emphasis on finding these DSE systems. We also conducted
24 a telephone survey of each of our sample systems to determine
25 their absolute gross receipts in 1976. So, we would not

1 be basing it on an old Fact Book and inflating it, but trying
2 to get the most accurate possible number for real terms 1976.

3 We were successful in reaching the majority of
4 the cable systems and getting the real '76 numbers. Those
5 which we were not able to reach we applied to growth factor
6 or we determined from the ones we did reach which was 19
7 percent.

8 So, the subscriber and revenue figures included
9 in that '76 Fact Book for those systems which we could not
10 reach directly and get specific 1976 numbers on were increased
11 by 19 percent. So, we had and were working with a sample
12 that was extremely up to date and current in 1976 terms.

13 Q Thus, for the number of subscribers and
14 there has been a large effort made on behalf of the
15 copyright owners to discredit the age of the data in the 1976
16 Fact Book. You are telling us now that the 8.7 million was
17 reached using subscriber and rate data which came from the
18 systems themselves in 1976 and not from the Fact Book?

19 A That is correct.

20 The next step in our process was to look at the
21 signal carriage of all the systems, not guessing on signals
22 carried, but looking at the specific signals they carried
23 and their classifications as distant signals or non-distant
24 signals based on FCC rules.

25 We went through each system and determined how

lw-21

1 many DSEs they had and worked out various copyright formula
2 on them. They ranged from .4 percent. I have worksheets
3 showing it being .8 percent. So, we used several different
4 fee schedules to try to determine an accurate fee schedule
5 to yield the desired an expected 8.7 million.

6 Q I note that the fee schedule in the NCTA/
7 MPAA agreement, which is Exhibit R-7, is not exactly the
8 same as the fee schedule which appears in Section 111.
9 Referring to NCTA Exhibit R-8, can you explain how this change
10 was urged upon Congress, how it was discovered?

11 A Yes. As the exhibit referred to demonstrates,
12 Mr. Valenti addressed a letter to the Chairman of--what is
13 the appropriate committee?

14 Q Administrative Law.

15 A The House Committee responsible for copyright
16 matters. We will leave it at that.

17 COMMISSIONER GARCIA: It is on the third page.

18 THE WITNESS: Thank you.

19 Stating some misgivings he had about the ability
20 of the fee schedule included in the MPAA/NCTA agreement to
21 reach the 8.7 million which had been agreed to and was
22 expected, he relates that MPAA hired a consultant who had
23 recommended a new sample be drawn and such a sample had been
24 drawn. He refers to the 19 percent which I just covered.
25 He concludes that even given these corrections and given the

lw-22

1 effort to make the survey as accurate as possible, it still
2 fell short of the anticipated 8.7 million.

3 NCTA recognized the shortfall. That is the
4 reason that the fee schedule is now different and increased
5 from the fee schedule included in the original agreement.

6 BY MR. FELDSTEIN:

7 Q You are saying the agreement by NCTA and MPAA, the
8 fee schedule was readjusted to be able to reach 8.7 million?

9 A That is correct.

10 Q That was done according to R-8 in mid-June of 1976;
11 is that correct?

12 A That's correct.

13 COMMISSIONER JAMES: So I'm clear, is there a
14 mention of 8.7 in the agreement?

15 MR. FELDSTEIN: There is not a mention of 8.7.
16 She testified to 8.7 in Mr. Valenti's letter.

17 COMMISSIONER JAMES: There is no mention of 8.7.

18 MR. FELDSTEIN: There is not, in the agreement.
19 Ms. Creech has testified to it. Mr. Valenti's letter, it is
20 an agreed amount.

21 COMMISSIONER JAMES: Why wasn't it put in the
22 agreement that this was to be achieved, that all parties were
23 to be bound by it?

24 THE WITNESS: I have no knowledge as to why that
25 was not included.

1 BY MR. FELDSTEIN:

2 Q Asking you to sum up once again, are you stating
3 that the 8.7 million was agreed upon target figure and
4 that the fee schedule was set using 1976 data so as to
5 achieve that goal?

6 A That is correct.

7 Q Earlier today, we heard testimony from Mr. Cooper
8 for the copyright holders. He attempted to discount the
9 factor of a shift by a cable system from a low pay into a
10 high pay or DSE category in the copyright payments. Do you
11 know how many and what percentage of cable systems would
12 have been in the DSE category in 1976?

13 A I do have the percentage, and I'm sure I have
14 the number somewhere. The percentage in 1976 in DSE category
15 was 19 percent.

16 Q How many are in the DSE category in 1980?

17 A According to testimony given by Ms. Beales,
18 25 percent are in the category in 1980.

19 Q In light of the fact that the DSE systems pay
20 some 90 percent of the copyright pool, do you believe that
21 this is an important figure and why?

22 A It is important. I would like to go through an
23 example which might demonstrate its value in these discussions.
24 When a cable system is a small, new cable system, it has low
25 revenues and pays on a non-DSE basis a straight or reduced

lw-24

1 payments for the schedule two systems. Once a schedule
2 system moves into the category of over 160,000 on a six-month
3 basis, they pay based on the number of distant signals which
4 they carry.

5 The distant equivalent, the number of signals
6 may not have changed during the entire period. Now, they will
7 be a factor in determining the copyright payment where they
8 were not a factor when the system was a small system paying
9 a straight \$30 a year, for example. What I have done is run
10 through a hypothetical system.

11 I believe it will shed light on the importance
12 of this movement into the new categories and the effect of
13 this new fee schedule. For example, let's say a system in 1976
14 had 4,000 subscribers. A monthly rate of \$6.60. That would
15 give it a six-month revenue of 185,400. It would be a
16 DSE system. The DSE system demarcation point is 180,000.
17 Let's say that system has 2.5 DSEs, it does not really
18 matter because they are not paying on a DSE basis.

19 The payment for that system would be \$1,184.
20 Let's say in 1979 that system has gotten a rate increase.
21 It still has 4,000 subscribers. It has not grown any, but
22 now it has a \$7 monthly rate which moving from 6.60 is not
23 a big growth in monthly rate. That growth, however, moves
24 it into the DSE category of 180,000, a six-month revenue. It
25 now pays based on 2.85 DSE.

Accurate Reporting Co., Inc.

(202) 726-3801

lw-25

1 \$2,205 is the payment, an 86 percent increase
2 from the payment it made before it started paying on DSE. This
3 is an example where the subscriber rate of the system increased
4 only six percent, but the effect on the copyright payment was
5 86 percent.

6 I have calculated a per subscriber payment which
7 goes from 30 cents per subscriber when the system was not a
8 DSE system to 55 cents subscriber when the system was DSE.
9 So, you can see the increase in rates, the increase in
10 subscribers has almost a domino affect in terms of copyright
11 receipt.

12 By moving these systems into a new category
13 under which they are more vulnerable to increased copyright
14 payment, this is a point which has not been made in this
15 testimony. It is important to understand that the increase
16 in subscriber rates which Ms. Beales testified to is coming
17 through an even larger amount. These systems are moving into
18 bigger categories and have a larger effective rate.

19 COMMISSIONER JAMES: Did you see an increase in
20 subscribers and an increase in rates?

21 THE WITNESS: No, sir. Kept subscriber constant
22 for the sake of this example and only increased rate.

23 COMMISSIONER JAMES: What would happen if you
24 increased the subscriber and left the rate the same? Would
25 that be unfair?

1 THE WITNESS: You could have the same affect.
2 If the increase in subscribers is large enough, you can
3 kick the system into a bigger category. It does not really
4 matter which increase is subscriber or revenues. Either one
5 can kick the cable system into that larger category.

6 COMMISSIONER JAMES: Is it your testimony that on
7 your example they have 4,00 and they now have 8,000 subscribers
8 with the rate they should not be kicked up?

9 THE WITNESS: No, sir.

10 MR. FELDSTEIN: She is not saying that's wrong.

11 COMMISSIONER JAMES: I thought she was.

12 BY MR. FELDSTEIN:

13 Q Would you repeat that?

14 A Ms. Beales, for example, using the \$8.7 in copyright
15 payments and the 10.8 million subscribers which you are
16 familiar with and using the 1979 numbers and 1978 numbers
17 has demonstrated that copyright payments on a per subscriber
18 basis had increased 33 percent from 1976 to 1980. Then, we
19 look at cable industry subscriber rates which our information,
20 as presented by Ms. Beales only increased 15 percent. How
21 did we increase the whole payment by 30 percent and only 15
22 for the rates. I'm trying to demonstrate that even the
23 small rate increase can have a larger impact on payments per
24 subscriber because it moves you into a larger category.

25 Q One more question, Ms. Creech. The testimony of

lw-27

1 Mr. Cooper in describing what would happen if more distant
2 systems equivalent were carried by the cable systems and
3 there was some questioning of him on that. We discussed
4 the imposition of the strict carriage rules between 1976 and
5 this date.

6 I asked him whether there could be a significant
7 amount on the average of cable systems existing in CATV
8 market and paying on a DSE basis, raising their number of
9 distant signals carried. The answer I received was not a
10 concrete answer. I would ask you that question.

11 On the average, would you expect to see cable systems
12 in a market that were in existence in 1976 adding on the
13 average very many distant signals between then and now, why not
14 or why?

15 A In my opinion, they would not be adding distant
16 signals because they would be precluded by FCC regulations
17 in effect, from adding signals. I believe Mr. Cooper's
18 example had the systems carrying two distant signals, which
19 is generally the limit for cable systems.

20 MR. FELDSTEIN: For the record, his went from
21 three to five.

22 THE WITNESS: I'm sorry. That is the higher end
23 of the limit for cable systems under the FCC's current rules.
24 A distant signal would be very difficult, if not impossible.
25 There would be signals not carrying the full complement. So,

lw-28

1 they would add one. You would have that kind of effect.
2 The ability to go from three to five or something like that
3 would be very difficult.

4 BY MR. FELDSTEIN:

5 Q The vast bulk of such systems would have already
6 been at their limit.

7 A Systems would be carrying their full capacity
8 because it is in their best interest as a business.

9 Q On the average between '76 and '80, the likelihood
10 of increase in DSEs for those systems that pay on that basis
11 would be relatively small?

12 A That's correct.

13 Q We have heard testimony today that we do not
14 really know what the DSEs were in '76 and '80, but are you
15 saying we can infer from the existence of the rules
16 that there was probably not a substantial increase?

17 A That's my belief.

18 MR. FELDSTEIN: That completes my direct
19 questions.

20 COMMISSIONER BRENNAN: Just one or two questions
21 as to the Chairman's curiosity about proceedings in the
22 Senate.

23 COMMISSIONER JAMES: Mine, too.

24 COMMISSIONER BRENNAN: Ms. Creech, as an expert
25 on history of the copyright revision bills, do you recall or

lw-29

1 can you cite any evidence that in the Senate there was
2 any determination that a certain amount of revenue was desirable
3 and then a fee structure was assembled to produce that amount
4 of revenue?

5 THE WITNESS: No, sir. My own experience in
6 directly being involved in copyright negotiations does not
7 go back far enough for me to be directly informed with that.
8 I was not aware that there was a target to be reached on the
9 Senate side. My impression was that the fee schedule was
10 developed which yielded a certain numerator than the other
11 way around.

12 COMMISSIONER BRENNAN: Therefore, any linkage
13 between the amount of revenue and the fee schedule occurred
14 subsequent to the bills passage by the Senate to the best of
15 your knowledge?

16 THE WITNESS: Yes.

17 COMMISSIONER BRENNAN: Thank you.

18 COMMISSIONER COULTER: Ms. Creech, on the issue
19 of the increase in the royalty rate per subscriber, if you add
20 an extra subscriber to a given system, there should not be
21 any change? There would be no change in the rate necessarily?

22 THE WITNESS: Your gross receipts would change
23 because you would have one more subscriber paying money. That
24 would effect, if I understand your question correctly, your
25 copyright payment.

1 COMMISSIONER COULTER: Sure. But, it would not
2 change it proportionately.

3 THE WITNESS: I'n not sure I understand what you
4 mean by proportionately.

5 COMMISSIONER COULTER: If you have a thousand
6 and you increase your number to 1,500 and you are not jumping
7 from one system to another and you are remaining in your
8 system, your gross receipts obviously increase. Since the
9 royalty rate is a percentage of those gross receipts, the
10 royalty rate per subscriber should proportionately remain
11 the same.

12 THE WITNESS: I believe so. If I understand
13 you correctly, yes.

14 COMMISSIONER COULTER: In the example you
15 cited of why only a 15 percent rate increase over the
16 years in question could produce a royalty rate per subscriber
17 over 30 percent, are you suggesting that the six percent
18 of the systems that went from form two to form three, 19
19 percent of them that were DSE systems and originally 25 are
20 primarily responsible for that difference?

21 THE WITNESS: I couldn't. Primarily is the only
22 word I have trouble with. I couldn't give you a precise value
23 that they have added to the difference. All I can do at this
24 point is explain the phenomenon and the effect it might have.
25 I couldn't weight it precisely in the total package, which I

lw-31

1 think is what you are looking for.

2 COMMISSIONER COULTER: Yes. In original testimony,
3 there were four factors listed.

4 THE WITNESS: I'm not able to weight it.

5 COMMISSIONER COULTER: If the increase in
6 subscribers would not cause that change proportionately,
7 then the phenomenon you have described should be responsible
8 for it in larger measure.

9 THE WITNESS: I am not able to quantify exactly
10 what the phenomenon I'm describing is responsible for. I
11 believe it does have a significant impact.

12 COMMISSIONER COULTER: Thank you.

13

14

15

16

17

18

19

20

21

22

23

24

25

dmm-1 1 COMMISSIONER JAMES: I have one question.

2 Going back to your response to Commissioner Brennan's
3 question, is it my understanding that the Senate came out with
4 a rate first that was not connected with any fee that would be
5 generated from it?

6 THE WITNESS: My recollection is that a fee schedule
7 was developed in the Senate which yielded a given amount of money
8 and that the fee schedule was developed first.

9 COMMISSIONER JAMES: That was what it expected to yield.

10 THE WITNESS: Correct.

11 COMMISSIONER JAMES: Not less than 8.7 is what
12 Mr. Valenti said. Since everybody was dealing with approximations
13 that was the bottom and the ceiling could have been 16 or 20
14 million dollars.

15 THE WITNESS: I'm sure Mr. Valenti would have been
16 happy if it had been but 8.7 was the number.

17 COMMISSIONER JAMES: Not less than 8.7. It could have
18 been more.

19 THE WITNESS: I believe Mr. Valenti would have been
20 happy to have more than 8.7. If we would have agreed to deliver
21 9.2. Mr. Valenti would not have come in and say I have been
22 wrong.

23 I believe he would be saying a minimum of 8.7.

24 COMMISSIONER JAMES: That is not what your side says.
25 If we are to take the letter's face value not less than.

THE WITNESS: 8.7 based on the Senate bill.

dmm-2 1 COMMISSIONER JAMES: Yes. Less than. Because every-
2 body is dealing in approximations, fees were going up by
3 subscribers in various systems. Could it not have conceivably
4 been the lowest Congress wanted to set as a base but presumably
5 and of course we do know now it has generated more.

6 THE WITNESS: All I can relate to you is the expecta-
7 tions of the Congress at the time that pole yielded 8.7. Any
8 of the fee schedules could have yielded more or less but the
9 expectation and the desire was to reach 8.7 from my experience
10 in participating in the activities at the time.

11 COMMISSIONER JAMES: I may have some more questions
12 Madam Chairman after cross examination.

13 CHAIRMAN BURG: Mr. Attaway how long will your cross-
14 examination be?

15 MR. ATTAWAY: Fifteen or 20 minutes now. I would like
16 to do it now.

17 CHAIRMAN BURG: Mr. Feldstein, will you be calling
18 additional witnesses?

19 MR. FELDSTEIN: I will not.

20 CROSS-EXAMINATION

21 BY MR. ATTAWAY:

22 Q I think Commissioner Coulter has solved our dilemma.
23 I'm grateful to him.

24 The direct case of NCTA referred to four factors
25 responsible for a change in the royalty fee per subscriber. The
first was inflation. The second was changes in the rates charged

dmm-3 1 subscribers. Those were the two factors that copyright owners
2 also based their case upon.

3 In addition to those two factors however, NCTA added
4 the increase in DSEs and the shift of systems from lower payment
5 categories into higher payment categories. Now Ms. Creech, you
6 have justified that there has been little if any change in DSE
7 carried by cable systems during this period; is that correct?

8 A I don't recall that I testified to that.

9 Q I believe you did. If you would like to change your
10 testimony.

11 A I believe the number of DSEs carried by cable systems
12 has increased over the period. I'm not able to quantify that.
13 I believe and agree with Mr. Cooper's statement it is a very
14 small increase. I believe he used less than one quarter of one
15 DSE.

16 Q A very small increase?

17 A Yes.

18 Q The fourth factor, a shift of systems into higher pay-
19 ment categories, you said you could not quantify that but you
20 had a feeling it is there.

21 A That is correct.

22 Q The primary factors are inflation and changes in rates
23 charged subscribers. Now if that is the case--

24 MR. FELDSTEIN: Point of order. Inflation was where
25 you started with. You subtracted four factors from it. You
listed three of the factors.

dmm -4

1 MR. ATTAWAY: Excuse me.

2 An additional set revenue.

3 BY MR. ATTAWAY:

4 Q Ms. Creech, could you estimate the percentage of this
5 change in royalty fee per subscriber that you speak of that is
6 responsible for additional increases in additional set revenues?

7 A No. I cannot.

8 Q I believe that the record will show that Ms. Beales
9 could not quantify that factor either.

10 A It may well be because the factor is so small that it
11 is not measureable.

12 Q Now I'm getting back to the first two factors. Having
13 gotten back to the first two factors, why do we have to worry
14 about whether 8.7 million dollars was an accurate estimate or
15 not when we have the CRT survey which shows exactly what first
16 set rates were in 1976 and what they were as of April 1980 and
17 we take that change.

18 We select an inflation factor either PCE or the CPI.
19 That will give us the adjustment this Tribunal is supposed to
20 make. Is that correct?

21 A No. It is not correct. The survey did not include
22 any listing of DSEs and therefore did not enable us to track the
23 kind of activities which I went through which was movement from
24 one category to another.

25 While you discounted that category, that is counted
directly to a factor you included which is change in rates. It

dmm-5 1 is change in rates which enable a system to move from one cate-
2 gory to another and expands the effect of the rate increase
3 beyond the initial percentage increase in rates. All the survey
4 done by CRT of 1976 rates would only give you rates. It would
5 not be able to give you movement into new categories, give you
6 a percent change in rates but not enable you to understand how
7 much of an impact that change had.

8 Q I believe you stated that the increase in the second
9 set of revenues is negligible. There has been very little
10 change in DSEs.

11 Now, you are back to shifting from one category to
12 another.

13 A Yes.

14 Q The copyright owners are not recommending an industry-
15 wide adjustment but according to the data we relied upon which is
16 CPI and the CRT survey, if there were an industry-wide adjustment,
17 we said that it would be on the order of 21 percent.

18 In your direct case, you said that relying on the same
19 CRT survey but the PCE that there should be no adjustment whatso-
20 ever. Now the huge difference is going to be explained by the
21 shift of cable systems from one revenue category to another.

22 A We did not use the CRT survey for the 1976 numbers. As
23 we have explained several times, we used the 8.7 royalty payments
24 and the 10.8 subscriber fees, not the CRT survey.

25 CHAIRMAN BURG: Let's stay seated but take a brief
recess.

dmm-6 1 (A brief recess was taken.)

2 CHAIRMAN BURG: Back on record. We will resume.

3 BY MR. ATTAWAY:

4 Q Resuming Ms. Creech, I'm still trying to discover what
5 accounts for the significant difference between the numbers that
6 we recommend for an adjustment and the numbers that you recommend
7 for an adjustment given the facts that you have discounted at
8 least two of the factors that we disagree should be considered.

9 You discount them as negligible. What explains the
10 difference?

11 A Let me review, again, the numbers we are talking about.
12 It is NCTAs position that the accurate numbers for 1976 are
13 the 10.8 million and the 8.7 million. We then move to 1980
14 numbers which are the 13.9 million subs and the 7.5 million in
15 royalties an increase of 33 percent increase.

16 Q If I may interrupt, why is it necessary now to refer to
17 the 8.7 million, those estimated numbers when we have a very
18 recent survey conducted by the CRT that gives us what should be a
19 very similar number?

20 A Does it give us? I can't ask you. A number which we
21 have for 1976 is 8.7 million.

22 COMMISSIONER JAMES: Based on the CRT survey?

23 THE WITNESS: No, sir.

24 COMMISSIONER JAMES: His question was predicated upon
25 if you have the 1976 copyright royalty Tribunal survey which
gives a different figure.

dmm-7

1 MR. FELDSTEIN: The witness is puzzled and I am because
2 the survey does not give anything that looks like 8.7 more or
3 less. It asks for what the rates were in 1976 and what the rates
4 were in 1980.

5 THE WITNESS: How can you compute without DSE which are
6 necessary for the copyright payment?

7 MR. FELDSTEIN: Or the set revenues.

8 MR. ATTAWAY: That is what you negated. You said both
9 factors are negligible. So let's get rid of them.

10 BY MR. ATTAWAY:

11 Q Did you not say the change in additional set revenues
12 is negligible? I said I believed it was negligible because it
13 was very different to measure.

14 It may be there is something there. We have yet to
15 quantify it. It may be one of the many factors which go into
16 accounting for the increase. So now that factor is either negli-
17 gible or unquantifiable?

18 A Yes.

19 Q What about the change in DSE? What is that?

20 A It is minimal.

21 Q My point is and also Commissioner James responding to
22 your comment or picking up on your comment if we can accept the
23 results of the CRT survey which yielded a 1976 average subscriber
24 rate of \$6.64, and we multiply that by 12 to get \$79.68 and take
25 the best estimate that we have for the number of 1976 subscribers,
we take your estimate from your exhibit.

dmm-8

1 Excuse me. It is exhibit R-3A which was 11.6 million
2 subscribers. We multiply our \$79.68 times 11.6 million. We
3 get --

4 Now I'm losing myself. Please bear with me.

5 COMMISSIONER JAMES: That gives you gross revenues.
6 You just apply the formula can't you?

7 MR. ATTAWAY: Yes.

8 THE WITNESS: No you can't.

9 BY MR. ATTAWAY:

10 Q I apologize. I was off on a tangent. I will try to
11 get back.

12 COMMISSIONER JAMES: Well, that is what I did. Let me
13 get back on the track with you. It gives you gross revenue. You
14 are saying you cannot apply what the statute says towards the
15 gross revenues.

16 THE WITNESS: No, sir. The statute does not apply a
17 uniform DSE to each system. It is based on the actual carriage
18 of the system.

19 One system might have four DSEs. Each has to be compu-
20 ted individually.

21 COMMISSIONER JAMES: I see what you mean.

22 THE WITNESS: That is why we had to do that very
23 tedious sampling process in 1976 to find out what an accurate
24 copyright payment would be.

25 We had to look at all the signals carried and look to
see how to apply that factor.

dmm-9 1 COMMISSIONER JAMES: You have cleared up something for
2 me. Thank you.

3 COMMISSIONER COULTER: I thought the average number of
4 DSEs has not changed very much.

5 THE WITNESS: The average.

6 MR. ATTAWAY: I must stay with this because I think
7 I'm on to something. I just am having a hard time getting there.

8 BY MR. ATTAWAY:

9 Q Ms. Creech, try once again to explain given the fact
10 the change in DSEs since 1976 is negligible why you do not want
11 to rely on the CRT survey as copyright owners do but instead
12 want to rely on the 1976 estimate of 8.7 million dollars.

13 A The CRT survey does not provide you with copyright
14 payment per subscriber which as I understand the statute is the
15 basis for the review proceeding which the Tribunal is undergoing
16 to review the copyright payment per subscriber.

17 Q I don't want to debate the statute but it directs the
18 Tribunal to reflect the inflation and the changes in average sub-
19 scribe rates for the purpose of maintaining the real constant
20 dollar value of the royalty fees paid per subscriber.

21 A It is my understanding that statute also directs atten-
22 tion to other extenuating factors. These are the factors which
23 we are trying to explore today.

24 One is movement into bigger categories which compounds
25 the impact of a change in subscriber fees. There may be others
which we have yet to quantify. The point is that subscriber,
copyright payments on a per subscriber basis has kept up with

dmm-10

1 inflation.

2 Q Only if you accept the 8.7 million dollars?

3 A I have not heard of a reason not to accept the 8.7
4 million dollars.

5 Q Okay. Let me move on and try to provide you with a
6 reason. First of all, I would like to refer to your exhibit the
7 memo. That is R.7.

8 A I don't have that.

9 Q Would you turn to page four of that memo, please.
10 Before I ask you to read from this agreement may I assume that
11 since you have introduced this into the record that you would
12 rely upon this agreement as a part of the legislative history of
13 this Copyright Act and that this agreement reflects legislative
14 intent?

15 A The legislative intent can only be reflected in the
16 legislative history. The agreement is between parties involved
17 in the legislative process. I do not believe it is a part of the
18 official legislative history.

19 Q Why was it introduced?

20 A It was introduced to demonstrate the agreement between
21 NCTA and MPAA to reach the monies we have discovered the 8.7 and
22 the fee schedule which begins with .6 percent.

23 Q I will accept it reflects the agreement made by MPAA
24 and NCTA. We will let the Tribunal judge whether that reflects
25 legislative intent. Given that basis on page four would you
read for the Tribunal the first two sentences and paragraph 8?

dmm-11 1 A The Tribunal may also adjust statutory rates to reflect
2 changes in terms of constant dollars in the average basic sub-
3 scriber rate throughout the cable industry.

4 The Tribunal may consider all factors relating to
5 maintaining the real constant dollar copyright payment per sub-
6 scriber and its relationship to the basic subscriber rate
7 structure.

8 Q Thank you.

9 Is it not clear at least from this agreement that it
10 was the intent of the two parties involved in this agreement that
11 the adjustment to be made in this proceeding was to maintain the
12 real constant dollar copyright payment per subscriber and its
13 relationship to the basic subscription rate structure?

14 A The language they have read would lead us to believe
15 that is the case.

16 Q Is that not what copyright owners are trying to present
17 in this proceeding? Open opposition to your interpretation of the
18 legislative language?

19 A That may well be what you are trying to present. I have
20 presented the cable industry's interpretation of the legislative
21 language.

22 Q Which is different from the language in this agreement?

23 A It is indeed as is the fee schedule.

24 Q Thank you.

25 Going back to the 8.7 million dollars, I believe you
said that when the copyright bill reached the house, the parties

dmm-12

1 attempted to construct a rate schedule that would achieve a total
2 royalty fee of 8.7 million dollars?

3 A For 1976 copyright payments. Yes. That is correct.

4 Q Where did that 8.7 million dollars come from?

5 A It is my understanding that S-22 the Senate bill would
6 have yielded 8.7 million dollars. That was what the parties
7 agreed should be the appropriate yield for the house bill.

8 Q Is it not correct that parties were trying to construct
9 a rate schedule for the house bill that would achieve the same
10 amount of royalties that would have been achieved by the Senate
11 bill?

12 A Yes. I believe that is correct.

13 Q Then if we, if the parties, inaccurately predicted
14 what the Senate bill would have yielded, our target number was
15 wrong?

16 A I don't believe that that is correct. I think that
17 the fact that the parties agreed that copyright payments in 1976
18 should yield 8.7 is a critical number.

19 That is all we were all working to. Developing a fee
20 schedule which would reach 8.7.

21 Q Ms. Creech, you keep changing your mind. I asked you
22 if our intent was to achieve whatever royalty fee the Senate bill
23 would have provided. You said yes.

24 A The aim was to achieve the 8.7 which was believed to
25 be what the Senate bill would have yielded.

Q Our intent was to achieve 8.7 million dollars period?

dmm-13

1 A Correct.

2 Q Is there any indication of that intent in that memoran-
3 dum of agreement?

4 A I believe there is not a statement that 8.7 is correct.

5 Q Are you familiar with this document?

6 A I am.

7 MR. ATTAWAY: For the record, this is a document
8 entitled "Background Information On Cable Copyright Legislation."
9 At the top there are a logos of NCTA and MPAA. It generally
10 describes the House bill.

11 I believe it was prepared as the Committee bill was
12 being presented on the floor.

13 BY MR. ATTAWAY:

14 Q Ms. Creech, are you familiar with this document?

15 A I am.

16 Q Is there any mention of 8.7 million dollars in that
17 document?

18 A I say I'm familiar with it because I participated in
19 preparing it. I have not read it in the last two years. So I
20 cannot state to you today whether the 8.7 is included.

21 Q Would you state my word that it is not appearing in
22 here subject to correction of the record, counsel?

23 MR. FELDSTEIN: Yes.

24 THE WITNESS: Yes.

25 BY MR. ATTAWAY:

Q Going back to the shifting of payment in the higher

dmm-14

1 categories and I apologize to the Tribunal for switching back
2 and forth, I believe you stated in your testimony that in 1976
3 19 percent of the cable systems were DSE paying systems and
4 18025 percent were DSE paying systems?

5 A That is correct.

6 Q During a short break I asked Ms. Beales to provide you
7 with a copy of your exhibit number 7 which she introduced. If
8 you are working out the percentage on that exhibit I believe you
9 will find that it shows in 1976 31.3 percent of the cable systems
10 were DSE paying systems. In 1980, 28.4 were DSE paying systems.

11 A The 1976 number I used of 19 percent is based on the
12 same amount which was drawn which I have discussed extensively.
13 It was based on systems reporting their specific revenues at the
14 time. I suspect from my knowledge of the cable industry and my
15 knowledge of trying to survey the cable industry that the
16 accuracy is a survey requesting information several years hence
17 is quite difficult.

18 I would suggest that the sample information
19 which was direct, on point and at the time is probably more
20 accurate.

21 Q Excuse me. Which is the same amount?

22 A I'm sorry. My 19 percent for DSE systems.

23 Q Is more accurate than chart number 7, exhibit 7?

24 A Your number was 31 percent in 1976 based on the
25 Tribunal survey.

Q 31.3. This is NCTAS number. It is in your chart

dmm-15

1 number 7?

2 A I realize that. It is based on the survey. My only
3 point is the survey is asking cable systems to recollect their
4 subscriber fees they charged several years ago.

5 There is more room for error in that kind of remember
6 what you charged approach than they probably was when we asked
7 them directly at the time what are you charging.

8 That is the only comment I have on the survey.

9 Q What was the size of the sample that you surveyed in
10 1976?

11 A It reached approximately 1200 cable systems.

12 Q How many responses were received by the Tribunal?

13 A I don't know. Perhaps someone else does. 1,673. I
14 would also remind you that both your own consultant and the
15 consultant hired by NCTA commented the survey done to develop the
16 copyright figures requested in a condensed level of 95 percent
17 which is very good.

18 Although 200 sounds like a very small sample it was a
19 very accurate sample. I think it is one that is reliable.

20 Q You insist the sample of 200 cable systems probably was
21 more accurate than the Tribunal's survey of some 1,873 systems?

22 A Yes. When confronted with two different numbers on the
23 same subject the only approach I can take is to figure out the
24 factors that go into each and determine where the room for error
25 might be. I know cable system people. They have a difficult
time remembering three or four years back of whatever.

dmm-16

1 That is the only light I can really shed on the
2 difference.

3 Q Your experience with cable operators is such that you
4 would imagine they don't keep record of what they charged?

5 A Many of the small systems do keep records but when
6 they fill out a survey they don't take the time necessary.

7 Q In trying to construct a rate formula for the House
8 bill, how were distant signals counted?

9 A Distant signal. Distant signal computation was based
10 on FCC rules at the time which define what a distant signal was.
11 It varried on the side of the market and that kind of thing. Dis-
12 tant independents counted full. Distant networks was what quarter.

13 Q What provisions made for signals carried only part-
14 time?

15 A There was no provision made for signals carried only
16 part-time.

17 Q Are you aware of the cross-examination of Ms. Beales'
18 where it stated that some 41 percent of the cable systems that
19 the DSE systems that we examined in our calculations for the
20 distribution proceeding carried one or more part-time signals?

21 A Yes. I'm aware of that.

22 Q By not counting part-time signals, did that not intro-
23 duce a significant error in these estimates?

24 A When we contacted various systems in '76 to ascertain
25 their accurate subscriber revenue categories subscriber we
attempted to get information on part-time carriage.

dmm-17 1 We met with mostly what are you talking about kind of
2 responses. Based on that and I made many of those phone calls
3 myself, they had no idea what part-time carriage was. We made
4 the judgment that part-time carriage was not a significant fact-
5 or in 1976.

6 Your information obviously shows that may be an in-
7 accurate statement. I think what we need to remember is the
8 8.7 million is our best effort at ascertaining directly with
9 cable systems what their copyright payment would be.

10 We have developed no better way to do that and that
11 8.7 million is the most accurate number. Ideally we could have
12 eliminated all uncertainty but that was not possible.

13 Q I have one final question relating to the hypothetical
14 you gave concerning the movement of a cable system into higher
15 payment category.

16 A Yes.

17 Q Would you repeat that?

18 A I heard mumblings about my percentages. I might have
19 calculator problems. We will try again. I had a 1976 systems
20 with 4,000 subscribers.

21 The \$6.60 monthly rate. It yielded a six-month revenue
22 of 158,400. That would make it a non-DSE system. I calculated
23 the copyright payment at \$1,184 for that system.

24 In 1979 the same system has not grown any. It only has
25 4,000 subscribers still but it has a rate increase. It is up to
\$7.00.

dmm-18

1 Carrying 2.75 DSE which is what it carried in '76. The
2 copyright payment is \$2,205 under that calculation. On a per
3 subscriber basis, the \$2,205 is 55¢ per subscriber.

4 The earlier number which I used the \$1,184 is 30¢
5 per subscriber.

6 Q Are you familiar with the small system adjustment pro-
7 posed by copyright owners?

8 A Only vaguely, I cannot really comment on it.
9 specifically. I have not been involved in following it through-
10 out the proceeding.

11 Q What is the percentage increase between \$6.60 and
12 \$7.00?

13 A I figured six percent. Is that correct?

14 Q That is what I figured, too. Copyright owners proposed
15 that the ceiling for that system be increased by six percent. So,
16 that system would continue to qualify as a non-DSE paying system.

17 Therefore, there would not be movement into a higher
18 category. Does that not effect somewhat the importance you place
19 on the movement into higher categories?

20 A I believe Mr. Attaway, you are talking about proposal
21 for future change in the legislator the statute. What we are
22 talking about here is changing from 1976 to 1979 under which the
23 current game rules that you move into these new categories would
24 be applicable.

25 Q We are proposing that we would take that particular
system after the Tribunal's decision and put it back in a non-DSE

category. Right. Do you recognize that this Tribunal's decision will also adjust the small system ceilings?

A I understand that.

Q So we have that adjustment is whether it is based upon our proposal or your proposal it is going to shift some systems.

A But have not these systems already paid during the period of the last several years because they have moved into the new category? This system if it indeed existed would have moved into new category and be paying the accelerated amounts.

You may come along and the Tribunal accepts the proposal but for 1976 to 1980 chances it has already happened.

Q Well, I think I made my point.

One final question, Ms. Creech. You state you have been involved with the cable industry at least since 1972. You were the director of research for NCTA and you were the vice president of research and now you are the Executive Vice President of NCTA.

May I assume you are quite well familiar with the cable industry today?

A I think that is probably accurate.

Q Would you tell us what effect on royalty payments and cable system gross revenues and profit at 20 or 30 percent surcharge on their present copyright rates would have?

A Members of the Tribunal have pointed any increase in the copyright payment is an expense for the cable television system.

dmm-20

1 As many people have observed in the financial communi-
2 ties the construction of major market systems, growth of cable
3 is done on a very fine margin.

4 I cannot sit here and tell you an increase of any
5 magnitude will put large numbers of cable systems out of busi-
6 ness. But to the extent it is an expense it has to be borne
7 the system or passed on to the consumers.

8 MR. ATTAWAY: I believe it was Mr. Young, one of the
9 capable operator witnesses.

10 BY MR. ATTAWAY:

11 Q He testified that the royalty payments his systems
12 made averaged out to be one percent of growth of subscriber
13 revenues. Is that about the average of what the industry would
14 pay?

15 A I believe that is correct. I am not familiar with
16 Mr. Young's testimony and I have not been directly involved in
17 the industry for a couple.

18 Q A 30 percent increase in copyright royalties would
19 result in approximately a total royalty payment by cable systems
20 of 1.3 percent of gross revenues?

21 A I can't argue with your arithmetic. We are here
22 commenting on a certain set of facts which will go into the
23 Tribunal's computation.

24 I don't believe the impact on the cable industry in
25 terms of .3 or whatever is included therein.

MR. ATTAWAY: That is all the questions I have.

dmm-21 1 Thank you very much.

2 Once again my estimate of 15 minutes was woefully
3 inaccurate. I apologize.

4 CHAIRMAN BURG: We must teach you how to tell time,
5 Mr. Attaway.

6 MR. FELDSTEIN: I have a couple of quick questions I
7 hope.

8 REDIRECT-EXAMINATION

9 BY MR. FELDSTEIN:

10 Q The 1976 copyright royalties were estimated to be 8.7
11 million as we have heard repeatedly. Some efforts were made
12 during the cross examination to try to elicit from you a more
13 accurate method of going back and recalculating what those might
14 have been. I believe you refused.

15 Mr. Cooper also testified yesterday that he would find
16 it difficult to go back using factbook information and recon-
17 struct this. In conclusion do you believe that one could go
18 back and pick up a more accurate figure than 8.7 million for
19 1976?

20 A To my knowledge there is not a way or methodology that
21 I have come up with for creating a more accurate 1976 number. We
22 did use real 1976 subscriber fees, subscriber numbers. I believe
23 that those numbers were as accurate as they could be.

dmm-Take 23 Q I have given Ms. Creech a copy of the House report
#5B 24 which has been previously referred to in the record and portions
25 of it have been entered into the record.

dmm-22 1 On page 175 of that report I have asked her to read
2 again into the record two sentences.

3 A "The Committee recognizes, however, that no royalty fees
4 will be paid by cable systems until the legislature is effective
5 on January 1, 1978.

6 Accordingly, the royalty fee per subscriber based
7 calculated at the time of enactment must necessarily constitute
8 an estimated value.

9 In the Committee's view and based on the projections
10 supplied by the interested parties the total royalty produced
11 under the fee schedule at the time of enactment should be
12 approximately 8.7 million dollars."

13 Q Thus as you read that language does the Committee
14 adopt the 8.7 million dollars estimate?

15 A It is my feeling that they do. The Committee does
16 adopt the 8.7.

17 Q Does the Committee recognize that their estimate and
18 the interested parties estimate was a best approximation effort.

19 A Yes they do from this language.

20 Q Thank you.

21 Commissioner James has referred to language in the
22 exhibit R8 of NCTA which is the letter from Mr. Valenti to
23 the Chairman.

24 It states that the royalty fees, that royalty formula
25 is to achieve a copyright pool of not less than the 8.7 million.
Will you tell us again your understanding of the agreement to

dmm-23 1 reach the 8.7 million dollar figure.

2 A The 8.7 as I stated was the targeted number that the
3 interested parties were attempting to reach. Mr. Valenti in
4 this language I expect is reflecting that that is his absolute
5 bottom line.

6 The 8.7 is the agreed upon number. I suspect he would
7 obviously like to be more and thus the language not less than.

8 MR. ATTAWAY: Excuse me.

9 I will not object to this but I will say Ms. Creech
10 is giving her opinion as to what the agreement was. She has pro-
11 duced no evidence to support that.

12 CHAIRMAN BURG: I understand that. I believe Com-
13 missioner James asked that of her also. If you asked for
14 objection I could hardly sustain it.

15 BY MR. FELDSTEIN:

16 Q If that appropriation as it was worked out at that
17 point in time had to your best guess and Mr. Attaway's best
18 guess in your survey efforts been predicted to have achieved
19 9.1 million dollars for example what would you have done with
20 the copyright fee schedule?

21 A Again, the targeted number is 8.7. If the targeted
22 number had been different whatever the target was, we would
23 have developed a fee schedule which met that target.

24 Q That is not my question. The 8.7 million was the
25 target. You have testified to that. This letter shows that
based on the work you and Mr. Attaway had done the 8.7 was

dmm-24 1 nothing to be hit by the fee schedule in the agreement. So this
2 letter indicates that the fee schedule was raised so as to hit
3 the 8.7. What if you are checking with your statistical experts
4 had shown that the fee schedule in the agreement was going to
5 hit 9.1?

What would you have done with the fee schedule?

6 A Understanding correctly we would have adjusted it to
7 reach 8.7.

8 Q You would have lowered it to reach 8.7?

9 A That is correct.

10 Q That is because 8.7 was your target?

11 A Correct.

12 MR. ATTAWAY: I will not object but let the record be
13 clear Ms. Creech is testifying what she might have done with the
14 fee schedule. She is not testifying as to what Congress would
15 have done with the fee schedule.

16 MR. FELDSTEIN: I cannot ask that but what NCTA and
17 MPAA would have done.

18 MR. ATTAWAY: Neither can she say what MPAA would have
19 done.

20 BY MR. FELDSTEIN:

21 Q Mr. Attaway questioned you at length about the factors
22 that go into the increase in the royalty fee per subscriber and
23 has referred again to the CRT questionnaire.

24 In the measurement of royalty fee per subscriber did
25 NCTA through Ms. Beales use any of these factors in its

dmm-25 1 measurement of royalty fee per subscriber?

2 A Which factors are you referring to?

3 Q The change in DSE, change in the second sets, etc.

4 A It is my understanding she did.

5 Q In the measurement of the royalty fee per subscriber?

6 A No. I'm sorry. I misunderstood. In explaining the
7 growth she used the various factors involved but in calculating
8 the royalty fee per subscriber she used the direct figures
9 either the 1976 figures or the 1980 figures.

10 Q Thus she could have calculated as she did the royalty
11 fee per subscribers and never mentioned those factors.

12 A That is correct.

13 Q The factors, am I correct that the factors were
14 mentioned, not quantified as potential helpful explanations to
15 the Tribunal.

16 A That is my understanding.

17 Q Do you know what changes in DSE were in the time
18 period?

19 A No, we do not.

20 Q Are the changes in the additional set revenues known?

21 A No, we do not.

22 Q Although we know this has been a category shift, can
23 we quantify that?

24 A We cannot.

25 Q We do know the rate increases?

A Yes.

dmm-26

1 Q You have stated there might be other factors involved
2 in the shift?

3 A Yes. .

4 Q In the change in the royalty fee per subscriber?

5 A We have not yet been able to ascertain yet.

6 Q Thus we know we can measure the royalty fee per sub-
7 scriber by any one of a number of methods without having to
8 explain and measure those factors that go into it?

9 A Yes.

10 Q Lastly, Mr. Attaway stated that he asked you about
11 copyright payment as a percent of gross revenue. He stated I
12 believe correctly characterizing the testimony of the industry
13 witness that the figure was somewhere between a percent and a
14 percent and a half from gross revenues from basic services of
15 cable television.

16 Would copyright be a larger percentage of net revenue?

17 A Yes. Of course it would.

18 Q Thus if a cable system with large gross revenues but
19 fairly small net income were faced with a 20 percent increase in
20 its copyright fees would this be a substantial--

21 A It could have a very substantial impact on the system
22 viability.

23 Q Thank you.

24 CHAIRMAN BURG: Thank you. We will adjourn.

25 (Whereupon the hearing was adjourned at 5:25 p.m.)

ERRATA SHEET

CHANGE

TO

202-726-3801